Supreme Court, U.S.
FILED
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CLERK

No. 98-6322 (7)

In The

Supreme Court of the United States

October Term, 1998

ANTONIO TONTON SLACK,

Petitioner,

v.

E.K. MCDANIEL, WARDEN, ELY (NEVADA) STATE PRISON, and FRANKIE SUE DEL PAPA, ATTORNEY GENERAL OF THE STATE OF NEVADA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed October 5, 1998
Certiorari Granted February 22, 1999

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IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO TONTON SLACK, Appellant, vs. THE STATE OF NEVADA, Respondent.	))))))))	No. 21421

ORDER DISMISSING APPEAL

(Filed Nov. 5 1991)

This is an appeal from a judgment of conviction of second-degree murder with the use of a deadly weapon. Having reviewed the record and briefs and having heard the parties' arguments, we conclude that Slack was properly convicted. On direct examination, Slack denied that he had a girlfriend/boyfriend relationship with the twelve-year-old victim. The prosecution's reference to a sexual relationship between Slack and the victim was not improper.

The prosecution, on cross-examination, asked Slack whether he had told the North Las Vegas Police Department that he had had sexual intercourse with the victim on Halloween, 1989. Slack did not remember making any such statement. Slack contends that this reference to an intimate relationship was improperly admitted because the jury was prejudiced by the thought of a nineteen-year-old man and a twelve-year-old girl having a sexual relationship.

We conclude that the prosecution's reference to the intimate relationship of Slack and the victim was properly admitted as evidence of Slack's credibility after he denied having a boyfriend/girlfriend relationship with the victim. The trial court has discretion over the limitations of cross-examination, Dyer v. State, 99 Nev. 422, 425, 663 P.2d 699, 701 (1983), and that discretion was not abused here.

Furthermore, any error in allowing this line of cross-examination was harmless, considering the amount of evidence linking Slack to the shooting. The fact that the jury returned a verdict of second-degree murder, when it was also instructed on first-degree murder, indicates that the disputed evidence was not prejudicial.

At oral argument, Slack's counsel conceded that the other issues raised in the brief were clearly without merit.

Accordingly, we hereby

ORDER this appeal dismissed.

/s/ Mowbray, C.J.
Mowbray

/s/ Springer, J.
Springer

/s/ Rose, J.
Rose

/s/ Steffen, J.
Steffen

/s/ Young, J.
Young

cc: Hon. Jack Lehman, Chief Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Rex Bell, District Attorney
Morgan D. Harris, Public Defender
Loretta Bowman, Clerk

ANTONIO T. SLACK
Name

31395
Prison Number

ELY STATE PRISON
Place of Confinement

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO TONTON SLACK, (Full Name) Petitioner vs. DIRECTOR, NEVADA DEPARTMENT OF PRISONS, Respondent (Name of Warden, Superintendent, jailor or authorized person having custody of petitioner.) and The Attorney General of the State of NEVADA, Additional Respondent. (**NOTE**: If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment of conviction was entered.)	CV-N----91-561-H CASE NO. ____ (To be supplied by the Clerk) PETITION FOR A WRIT OF HABEAS CORPUS PURSUANT to 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY

1) Name and location of the court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT CLARK COUNTY, LAS VEGAS, NEVADA

2) Date judgment of conviction was entered: MAY 1990

3) Case number: C92060.

4) Length and terms of sentence: TWO (2) CONSECUTIVE 5-YEARS-TO-LIFE SENTENCES

   a) In a capital case where death penalty has been imposed, date of scheduled execution NOT APPLICABLE

5) Are you presently serving a sentence imposed for a conviction other than the conviction under attack in this motion?

   Yes [ ] No [XXX]

6) Nature of the offense involved: (all counts) SECOND DEGREE MURDER WITH USE OF DEADLY WEAPON

7) What was your plea? (check one)

   a) Not Guilty [XXX] b) Guilty [ ]
   c) Nolo Contendere [ ]

8) If you entered a plea of guilty pursuant to a plea bargain, state the terms and conditions of the agreement: NOT APPLICABLE

9) If you were found guilty after a plea of not guilty, was the finding made by: (check one)

   a) A jury [XXX]
   b) A judge without a jury [ ]

10) Did you testify at trial (if any)?
    Yes [XXXX] No [XXXX]

11) Did you appeal from the judgment of conviction? Yes [XXX] No [ ]

12) If you did appeal, state the name and location of the court where the appeal was filed, the result, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NEVADA SUPREME COURT NO. 21421 DISMISSED APPROX. OCT/NOV PETITIONER DOES NOT POSSESS FINAL ORDER AT THIS TIME

13) If you did not appeal, explain briefly why you did not: DID APPEAL / NOT APPLICABLE

a) Did you seek permission to file a late appeal? Yes [ ] No [XXX] WASN'T NECESSARY

14) State concisely every ground on which you claim that you are being unlawfully held. Summarize briefly the facts supporting each ground. If necessary, you may attach up to two extra pages stating additional grounds or supporting facts. You should raise in this petition all available grounds for relief which relate to the conviction under attack.

CAUTION

Before proceeding in a federal court, you are required to exhaust the remedies available to you in the state courts as to each ground on which you request action by the federal court.

A)(1) Ground One: INSUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO CONVICT THE DEFENDANT WITH SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

INCIDENT INVOLVED ACCIDENTAL SHOOTING, TESTIMONY SUPPORTS SAME, CONVICTION ON SECOND DEGREE MURDER IS WITHOUT ESSENTIAL ELEMENTS OF OFFENSE FOR SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON, INTENT AND POSSESSION OF WEAPON LACKING FACTUAL EVIDENCE OR TESTIMONY. ALSO *SEE* PETITIONER'S OPENING BRIEF FROM STATE COURT DIRECT APPEAL ON THIS CLAIM WHICH WAS *CONSTITUTIONALLY RAISED ON BASIS OF JACKSON V. VIRGINIA*, 443 U.S. 307 (1979).

(3) Statement of Exhaustion of State Remedies as to Ground One:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue?

Yes [XXX] No [ ]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court?

Yes [ ] No [XXXXX]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition?

Yes [ ] No [ ] NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition?

Yes [ ] No [ ] NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal,
Yes [ ] No. [ ],
N/A and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED ISSUE.

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED ISSUE

B)(1) Ground Two: THE TRIAL COURT IMPROPERLY ALLOWED PREJUDICIAL EVIDENCE OF A SEXUAL RELATIONSHIP BETWEEN THE DEFENDANT AND THE TWELVE YEAR OLD VICTIM.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

EVIDENCE OF PRIOR BAD ACTS AND UNCHARGED MISCONDUCT VIOLATED DEFENDANT'S RIGHT to A FAIR TRIAL *UNDER FOURTEENTH AMENDMENT*

AS FURTHER ARGUED IN THE DIRECT APPEAL, *SEE ALSO* DEFENDANT'S OPENING BRIEF IN STATE DIRECT APPEAL.

(3) Statement of Exhaustion of State Remedies as to Ground Two:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue?

Yes [XXX] No [ ]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did that: DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court?

Yes [ ] No [XXX]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition?

Yes [ ] No [ ] NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition?

Yes [ ] No [ ] NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal,
Yes [ ] No [ ], NA

and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: DIRECT APPEAL IN STATE SUPREME COURT EXHAUSTED

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: STATE SUPREME COURT RULED ON ISSUE EXHAUSTING REMEDIES

C)(1) Ground Three: THE REASONABLE DOUBT INSTRUCTION TO JURY BY TRIAL COURT VIOLATED DUE PROCESS CLAUSE OF U.S. AND STATE CONSTITUTION (CAGE VS LOUISIANA) GROUND FOUR: TRIAL COURT ERRED BY NOT ADEQUATELY DEFINING PREMEDITATION IN JURY INSTRUCTIONS REGARDING MURDER.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

GROUND THREE: REASONABLE DOUBT INSTRUCTION VIOLATED DUE PROCESS CLAUSE OF BOTH THE U.S. AND NEVADA CONSTITUTIONS, *SEE CAGE V. LOUISIANA*, 111 S. Ct. 328 (1990).

GROUND FOUR: TRIAL COURT VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHTS AS SHOWN IN DEFENDANT'S STATE COURT SUPREME

COURT DIRECT APPEAL OPENING BRIEF (UNITED STATES V. GILBREATH, 452 F. 2d 992, 5th CIR. 1971), BY FAILING TO ADEQUATELY DEFINE "PREMEDITATION" IN JURY INSTRUCTION.

(3) Statement of Exhaustion of State Remedies as to Ground Three:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue?

Yes [XXXX] No [ ]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: DID RAISE / NOT APPLICABLE

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court?

Yes [ ] No [XXXX]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: NOT APPLICABLE

(e) Did you receive an evidentiary hearing on your motion or petition?

Yes [ ] No [ ] NOT APPLICABLE

(f) Did you appeal from the denial of your motion or petition?

Yes [ ] No [ ] NOT APPLICABLE

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal,
Yes [ ] No [ ],
N/A and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): NOT APPLICABLE

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: STATE SUPREME COURT APPEAL EXHAUSTED ISSUE

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: STATE SUPREME COURT APPEAL EXHAUSTED ISSUE

15) Have all grounds for relief raised in this petition been presented to the highest state court having jurisdiction?

Yes [XXXXX] No [ ]

16) If you answered "No" to question 15, state which grounds have not been so presented and briefly give your reason(s) for not presenting them: NOT APPLICABLE

17) Have you previously filed any type of petition, application or motion in a federal court regarding the conviction under attack?
Yes [ ] No [XXXXX]

If "Yes", state the location of the court, the type of proceeding, the issues raised, the result and the date of the court's decision for each petition, application or motion filed: NOT APPLICABLE

18) Do you have any petition, application, motion or appeal now pending in any court regarding the conviction under attack?

Yes [XXXX] No [ ].

If "Yes", state the name of the court and the nature of the proceeding: NOT APPLICABLE

19) Were you represented by an attorney at any time during the course of your arraignment and plea, trial (if any), sentencing, appeal (if any), or during the preparation, presentation or consideration of any petitions, motions or applications which you filed with respect to this conviction?

Yes [XXXXXX] No [ ].

If "Yes", state the name(s) and address(es) of any such attorney(s), the proceedings in which you were so represented and whether said attorney(s) was/were of your own choosing or if appointed by the court: FROM ARRAIGNMENT THRU TRIAL = MICHAEL GARDNER DEPUTY CLARK COUNTY PD ON DIRECT APPEAL = SAME COUNSEL ABOVE (MICHAEL GARDNER, DEP.P.D.)

Wherefore, petitioner prays that the court grant him such relief to which he may be entitled in this proceeding.

REQUESTED 18 USC E ✓Antonio T. Slack
Signature of Petitioner

3006A-g

Signature of Attorney (if any)

(Attorney's full address and telephone number.)

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the petitioner in the above action, that he has read the above pleading and that the information contained therein is true and correct. 28 U.S.C. § 1746. 18 U.S.C. § 1621.

Executed at ELY, NEVADA on
(Location)

NOVEMBER 12, , 1991
(Date)

✓Antonio T. Slack
(Signature)

ANTONIO TONTON SLACK
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

Petitioner In Pro Se

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO TONTON SLACK,	Case No. CV-N-91-561-HDM
Petitioner,	MOTION TO STAY THESE HABEAS PROCEEDINGS
DIRECTOR, NDOP, et al.,	
Respondents.	

_____/

COMES NOW, petitioner, ANTONIO T. SLACK, in pro se and with the assistance of an inmate law clerk, MICHAEL R. EVANS #26022, to respectfully move this Honorable Court for an order staying these habeas proceedings until this petitioner has exhausted the following issues in a state court proceeding, pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982) and *Harris v. Reed*, 109 S.Ct. 1038 (1989):

1) Ineffective assistance of counsel during all pretrial and trial proceedings as follows:

a) Failure to raise a Franklin violation, in that the deal made with petitioner's co-defendant was not completed before his testimony was allowed;

b) That counsel failed to offer and/or request an accomplice and/or informant instruction.

2) That the trial court erred in not instructing the jury on an accomplice instruction and his testimony.

3) That the trial court erred in allowing the petitioner's co-defendant to testify prior to the deal being made with him and the state being completed.

4) That there was prosecutorial misconduct, in that the prosecution withheld from the jury the fact that the only finger prints found on the murder weapon were those of the co-defendant's.

Petitioner respectfully request one (1) year to litigate these issues in a state court proceeding so that he may present these issues with the issues that he has already presented in his filed habeas.

Dated this 31st day of January, 1992.

respectfully submitted by,

/s/ Antonio Tonton Slack
ANTONIO TONTON SLACK

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 31 day of January, 1992, that I placed a true and correct copy of the foregoing motion in the United States mail, postage prepaid, addressed as follows: Frankie Sue Del Papa, Nevada Attorney General, Capitol Complex, Carson City, Nevada 89710.

/s/ Antonio Tonton Slack
ANTONIO TONTON SLACK
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

Petitioner In Pro Se

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ANTONIO TONTON SLACK,

Petitioner,

vs.

DIRECTOR, NDOP, et al.,

Respondents.

_____/

Case No. CV-N-91-561-HDM

PURPOSED [sic] ORDER

After reading the petitioner's motion to stay these habeas proceedings and good cause appearing.

IT IS HEREBY ORDERED that these proceedings are stayed for a period of one (1) year or until the parties notify this court otherwise.

IT IS SO ORDERED.

Dated this ___ day of _____, 1992.

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

ANTONIO TONTON SLACK,
Plaintiff(s),
vs.
DIRECTOR, NEVADA DEPARTMENT OF PRISONS, et al.,
Defendant(s).

CV-N-91-561-HDM

MINUTES OF THE COURT

February 19, 1992

PRESENT: HONORABLE HOWARD D. McKIBBEN, U.S. DISTRICT JUDGE

Deputy Clerk: Bette Stewart

Reporter/Recorder: Donna Casey

Counsel for Plaintiff(s): Antonio Tonton Slack, in Pro Se

Counsel for Defendant(s): Kevin G. Higgins

PROCEEDINGS: Telephonic Hearing on Petitioner's Motion to Stay Habeas Proceedings (#5)

9:10 a.m. Court convenes.

Court and counsel confer.

There being no objection by either party,

IT IS ORDERED that this action is *dismissed* without prejudice. Petitioner is granted leave to file an application to renew upon exhaustion of all State remedies.

9:15 a.m. Court adjourns.

CAROL C. FITZGERALD, CLERK

By: /s/ Bill Stewart
Deputy Clerk

CASE NO. ~~89 090260 C~~ 92060

DEPT. NO. 4

IN THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR THE
COUNTY OF CLARK

* * *

ANTONIO SLACK, Appellant, vs STATE OF NEVADA, Respondent.	REQUEST FOR APPOINTMENT OF AN ATTORNEY (Filed Feb. 1, 1993)

COMES NOW, ANTONIO SLACK, in proper person, with this request that an attorney be appointed to represent him. This request is made pursuant to NRS 171.188 whereas an indigent person can have an attorney appointed to represent him.

The above named Appellant swears under penalty of purjury [sic] that he is without means of employing an attorney.

Dated this 26 day of January, 1993.

/s/ Antonio Slack
ANTONIO SLACK

in proper person

REX BELL
DISTRICT ATTORNEY
Nevada Bar #001799
200 S. Third Street
Las Vegas, Nevada 89155
(702) 455-4711
Attorney for Plaintiff
THE STATE OF NEVADA

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- ANTONIO TONTON SLACK, #0926733 Defendant,	)	CASE NO. C92060 DEPT. NO. IV DOCKET NO. C

ORDER

DENYING PROPER PERSON PETITION FOR

POST-CONVICTION RELIEF

DATE OF HEARING: 9-2-92
TIME OF HEARING: 9:00 A.M.

The Proper Person Petition for Post-Conviction Relief of Antonio Tonton Slack having come before the above entitled Court on the 2nd day of September, 1992, this Court having duly considered the Proper Person Petition for Post-Conviction Relief and Respondent's Answer in

Opposition to the Petition for Post-Conviction Relief and good cause appearing the Court does hereby enter the following Findings of Fact, Conclusions of Law and Decision:

FINDINGS OF FACT

1. The trial of this matter occurred between February 20 and February 22, 1990 in Department IV of the Eighth Judicial District Court. The trial jury returned a verdict of guilty of Murder of the Second Degree With Use of a Deadly Weapon. Thereafter, the court imposed consecutive sentences of life with the possibility of parole in the Nevada State Prison. Additionally, the Court stipulated that Slack should pay $2,413.50 in restitution.

2. A direct appeal was pursued to the Nevada Supreme Court and by its Order Dismissing Appeal filed November 5, 1991 the conviction and sentence of Slack were affirmed.

3. Defendant Slack did cause to be filed on July 10, 1992 a Proper Person Petition for Post-Conviction Relief wherein he alleged that he had received ineffective representation of counsel at the trial and appellate levels and that the Court had committed judicial error during his trial proceedings. The Court does expressly find that all of the allegations raised by the Defendant are contradicted by the record in this case. Slack was represented by Michael Gardner of the Clark County Public Defender's Office at the trial and appellate levels. The Court finds that his representation was effective, professional, vigorous and thorough. The petition of Slack has failed to establish that the representation of Michael

Gardner was deficient or that Slack was prejudiced by the manner in which he was defended by counsel.

4. Slack has complained in his petition that his trial counsel failed to determine what type of agreement was reached with Kamal Bey, who was a principal State's witness. The Court finds that this contention is totally specious. The preliminary hearing and the trial record explicitly established the nature of the agreement between Bey and law enforcement. In return for Bey's cooperation as a witness the State of Nevada agreed to withdraw its motion to have Kamal Bey certified to stand trial as an adult. However, the substantive charge of accessory to murder in the juvenile system was not affected by the agreement. Subsequently, Bey was committed to Elko for six months as a result of the finding in Juvenile Court regarding the accessory to commit murder offense. Accordingly, this Court finds that Defendant Slack and his attorney were completely aware of the parameters of the agreement reached between Kamal Bey and the prosecution. Further, this Court finds that trial counsel was not ineffective in failing to file a pre-trial motion in limine to exclude the testimony of Kamal Bey. Nothing about the status of Kamal Bey made him incompetent to be a prosecution witness. Effective trial representation does not require the filing of frivolous pre-trial motions. Slack argues that his trial counsel failed to interview Slack's brother to refute the testimony of Kamal Bey. However, the testimony of a family member would have been inherently suspect and of questionable credibility in the eyes of the jury. Also, this contention is a naked allegation unsupported by any factual predicate. Slack contends that his counsel was ineffective in failing to file

a pre-trial motion in limine to exclude reference to prior sexual relations with the victim. This contention is frivolous. In its Order Dismissing Appeal filed November 5, 1991 the Nevada Supreme Court ruled that the prosecution's reference to the intimate relationship between Slack and the victim was properly admitted as evidence of Slack's credibility after he denied having a boyfriend/girlfriend association with the victim. Hence, this issue has already been addressed by the State Supreme Court and the Court finds that their previous ruling remains the law of this case. Slack submits that his counsel was ineffective in not requesting an accomplice instruction. This Court finds no evidence that Kamal Bey was an accomplice to murder. Consequently, the Court would not have given an accomplice instruction had one been proffered by trial counsel for Defendant Slack. Slack also argues that he was prejudiced by the failure of his counsel to present evidence to the jury that the only fingerprints found on the murder weapon were those of Kamal Bey. This assertion is a naked allegation unsupported by the record. Furthermore, Defendant Slack made various admissions to citizens and to representatives of the North Las Vegas Police Department accepting responsibility for the shooting of Alanna Holmes. Accordingly, the Court finds that the totality of the evidence introduced at the trial was overwhelming proof that Slack was the shooter of Alanna Holmes.

5. Slack also argues that he received ineffective representation during his direct appeal. The Court finds that this contention is without merit. Slack contends that a Franklin violation should have been raised on direct appeal. However, there is no evidence that Kamal Bey

was an accomplice in the shooting of the victim. The only evidence involved Kamal Bey as an accessory to the murder of Alanna Holmes. The Franklin rule applies to accomplice testimony. Therefore, the Court finds that the Franklin issue was not applicable to this case. Likewise, since there is no evidence that Bey was an accomplice it was not incumbent upon appellate counsel to argue before the State Supreme Court that an accomplice instruction should have been given to the trial jury. Additionally, this Court finds no evidence of prosecutorial misconduct in the record of the trial proceedings. So, the failure of appellate counsel to raise the issue of prosecutorial misconduct does not establish ineffective representation.

6. The Court also rejects all arguments by Slack that judicial error occurred at his trial. This Court finds that the trial court properly instructed the trial jury. Instructions regarding accomplice testimony were not applicable in that no accomplice testified. The issue regarding premeditation is now academic. The trial jury convicted Slack of Murder of the Second Degree With Use of a Deadly Weapon and not murder of the first degree.

CONCLUSIONS OF LAW

1. Slack's claim of ineffective assistance of counsel must be analyzed under the "reasonably effective assistance" standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the Nevada Supreme Court in *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied, 471 U.S. 1004 (1985). The *Strickland* standard requires a two-prong analysis. First, a defendant

must show that his counsel's performance was deficient. This analysis requires a showing that counsel made errors so serious that a defendant's attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, a defendant must show that the deficient performance prejudiced his defense and caused him to be deprived of his right to a fair trial. See also *Bejarano v. State*, 106 Nev. 840, 842, 801 P.2d 1388 (1990). This Court concludes as a matter of law that Defendant Slack has failed to establish that his trial and appellate counsel provided ineffective representation and Slack has failed to show that he suffered any prejudice by the manner in which he was represented at the trial and appellate levels. Additionally, Defendant may not litigate in a petition for post-conviction relief matters which have been decided on his direct appeal. *Hall v. State*, 91 Nev. 314, 535 P.2d 797 (1975); *Walker v. State*, 85 Nev. 337, 343, 455 P.2d 34 (1969) and *State v. Loveless*, 62 Nev. 312, 150 P.2d 1015 (1944).

2. Further, the Court concludes that Slack's proper person petition consists entirely of factual claims which are belied or repelled by the record of these proceedings. A defendant seeking post-conviction relief is not entitled to an evidentiary hearing or to any of the remedies he seeks based upon factual allegations which are contradicted by the record. See *Hargrove v. State*, 100 Nev. 498, 686 P.2d 222 (1984) and *Grondin v. State*, 97 Nev. 454, 634 P.2d 456 (1981).

DECISION

Accordingly, based on the foregoing Findings of Fact and Conclusions of Law, it is the Order of this Court that Defendant Slack's Proper Person Petition for Post-Conviction Relief is hereby denied.

DATED this 11th day of February, 1993.

/s/ Gerard J. Boneauanni
DISTRICT JUDGE

REX BELL
DISTRICT ATTORNEY
Nevada Bar #001799

BY /s/ Melvin T. Harmon
MELVIN T. HARMON
Chief Deputy District Attorney
Nevada Bar #000862

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO TONTON SLACK, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	No. 25088

ORDER DISMISSING APPEAL

(Filed Dec. 30, 1993)

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.

On May 23, 1990, the district court convicted appellant of one count of second degree murder with use of a deadly weapon. The district court sentenced appellant to serve in the Nevada State Prison two consecutive terms of life with the possibility of parole. This court dismissed appellant's direct appeal. Slack v. State, Docket No. 21421 (Order Dismissing Appeal, November 5, 1991).

On July 10, 1992, appellant filed in the district court a petition for post-conviction relief. In his petition, appellant argued that he was denied his right to effective assistance of counsel at trial and that he was denied his right to effective assistance of counsel on direct appeal. Appellant further argued that the district court erred by failing to instruct the jury on the credibility of accomplice testimony and premeditation. Specifically, appellant stated the following about his trial attorney: 1) he failed

to find out what type of agreement was made with Kamal Bey, the state's key witness and appellant's co-defendant; 2) he failed to file a motion in limine to prohibit the introduction of evidence concerning prior sexual relations with the victim; 3) he failed to file a motion in limine to prohibit the testimony of Kamal Bey because Bey's agreement with the state required specific testimony by Bey; 4) he failed to interview appellant's brother even though the brother's testimony would have rebutted Bey's testimony; 5) he failed to examine Bey about Bey's agreement with the state; 6) he failed to request an accomplice instruction; and 7) he failed to introduce evidence concerning fingerprints belonging to Bey which were found on the murder weapon. Further, appellant stated the following about his appellate attorney: 1) he failed to raise as an issue on appeal a *Franklin* violation which occurred during trial; 2) he failed to raise the issue that appellant's trial counsel failed to request an accomplice instruction; 3) he failed to raise the issue that Kamal Bey was a co-defendant and thus Bey's testimony was questionable; and 4) he failed to raise the issue that there was prosecutorial misconduct in that the prosecutor failed to inform the jury that Bey was a co-defendant and that Bey's fingerprints were the only fingerprints found on the murder weapon.

The state opposed appellant's petition. In its opposition, the state claimed that appellant's allegations are repelled by the record. On February 11, 1993, the district court, without appointing counsel or conducting an evidentiary hearing, denied appellant's petition for post-conviction relief. The district court concluded that appellant's allegations are belied or repelled by the record and

that appellant was not entitled to an evidentiary hearing on his claims. This appeal followed.

When a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). Our review of the record on appeal and specifically our review of the transcript of appellant's trial, reveals that appellant's claims are repelled by the record. The terms of the state's agreement with Bey were fully disclosed to the jury. At trial, appellant's theory of the case was that he accidentally shot the victim. Appellant testified that his finger was on the trigger when the gun fired. It is therefore irrelevant that Bey's fingerprints were found on the weapon. Bey was neither an accomplice nor a co-defendant. Appellant was not prejudiced by the lack of an accomplice testimony instruction. Appellant's remaining claims are similarly repelled by the record. The district court properly denied appellant's petition for post-conviction relief.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant cannot demonstrate error in this appeal, and that briefing and oral argument are unwarranted. *See* Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), *cert. denied*, 423 U.S. 1077 (1976). Accordingly, we

ORDER this appeal dismissed.

/s/ Rose, C.J.
Rose

/s/ Steffen, J.
Steffen

/s/ Young, J.
Young

/s/ Springer, J.
Springer

/s/ Shearing, J.
Shearing

cc: Hon. Gerard J. Bongiovanni, District Judge
Hon. Frankie Sue Del Papa, Attorney General
Hon. Rex A. Bell, District Attorney
Antonio Tonton Slack
Loretta Bowman, Clerk

Antonio T. Slack
Name

31395
Prison Number

Ely State Prison
Place of Confinement

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO TONTON SLACK,
(Full Name)
Petitioner

vs.

S.K. McDANIEL,
(Name of Warden, Superintendent, jailor or authorized person having custody of petitioner.)
Respondent.

and

The Attorney General of the State of NEVADA,
Additional Respondent.

NOTE: if petitioner is attacking a judgement which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgement of conviction was entered.)

CV-N-95-00194-DWH (N/A)

Petition For A WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY

(Filed May 30, 1995)

1) Name and location of the court which entered the judgement of conviction under attack: THE 8TH JUDICIAL DISTRICT COURT LAS VEGAS NEVADA

2) Date judgement of conviction was entered: MAY 22, 1990

3) Case Number: C-92060

4) Length and terms of sentence: TWO (2) CONSECUTIVE 5 YEARS TO LIFE TERMS

   a) In a capital case where death penalty has been imposed, date of scheduled execution N/A

5) Are you pesently [sic] serving a sentence imposed for a conviction other than the conviction under attack in this motion?

   Yes [ ] No [XX]

6) Nature of the offense involved: (all counts) SECOND DEGREE MURDER WITH THE USE OF DEADLY WEAPON

7) What was your plea? (check one)

   a) Not Guilty [XX] b) Guilty [ ]
   c) Nolo Contendere [ ]

8) If you entered a plea of guilty pursuant to a plea bargain, state the terms and conditions of the agreement: _____

9) If you were found guilty after a plea of not guilty, was the finding made by: (check one)

   a) A jury [XX]
   b) A judge without a jury [ ]

10) Did you testify at trial (if any)?
    Yes [XX] No [ ]

11) Did you appeal from the judgement of conviction?
    Yes [XX] No [ ]

12) If you did appeal, state the name and location of the court where the appeal was filed, the result, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): THE SUPREME COURT OF NEVADA CARSON CITY, NV. DISMISSED ON NOV. 05, 1991 CASE NO. 21421

13) If you did not appeal, explain briefly why you did not: _____

   a) Did you seek permission to file a late appeal?
   Yes [ ] No [ ]

14) State concisely every ground on which you claim that you are being unlawfully held. Summarize briefly the facts supporting each ground. If necessary, you may attach up to two extra pages stating additional grounds or supporting facts. You should raise in this petition all available grounds for relief which relate to the conviction under attack.

CAUTION

Before proceeding in a federal court, you are required to exhaust the remedies available to you in the state courts as to each ground on which you request action by the federal court.

A)(1) Ground One: PETITIONER WAS DENIED HIS 6th ADMENDMENT [SIC] RIGHT TO AN EFFECTIVE ASSISTANCE OF COUNSEL AT PRE-TRIAL & TRIAL; PETITIONER DENIED HIS 6th AMENDMENT TO EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL

(2) Supporting Facts: (Without citing legal authority or arguments state briefly the facts which support your claim.)

SEE ATTACHED PAGE 3A-3B

SLACK V. STATE

CASE NO. CV-N-00194-DWH (N/A)

POST-CONVICTION PETITION WRIT OF
HABEAS CORPUS
GROUN [SIC] ONE SUPPORTING FACTS:

PETITIONER'S COUNSEL OF RECORD FAILED TO CONDUCT PROPER PRE-TRAIL [SIC] AND TRIAL PROCEEDINGS IN THE FOLLOWING MANNERS:

1) FAILED TO FIND OUT WHAT KIND OF DEAL KAMAL BEY, MADE WITH THE STATE FOR HIS TESTIMONY. 2) FAILED TO FILE A PRE-TRAI [SIC] MOTION IN LIMINE TO STOP THE INTRODUCTION OF PRIOR SEXUAL RELATIONS WITH THE VICTIM. 3) FAILED TO FILE A PRE-TRIAL MOTION IN LIMINE TO STOP THE TESTIMONY OF KAMAL BEY, ILLEGIBLE HIS DEAL WITH THE STATE WAS BASED TOTALLY ON HIS TRIAL TESTIMONY, IN THAT THE DEAL WASN'T COMPLETED. 4) FAILED TO INTERVIEW DEFENDANT'S BROTHER TO REFUTE THE TESTIMONY OF KAMAL BEY. 5) TRIAL COUNSEL FAILED TO HAVE DISCLOSED WHAT DEAL WAS MADE WITH KAMAL BEY AND THE STATE. 6) COUNSEL FAILED TO REQUEST AN ACCOMPLICE INSTRUCTION. 7) COUNSEL FAILED TO HAVE IT DISCLOSED TO THE JURY THAT THE ONLY FINGERPRINTS FOUND ON THE MURDER WEAPON WERE NOT THE DEFENDENT'S AND WERE THOSE OF KAMAL BEY THE DEFENDANT'S CO-DEFENDANT. 8) COUNSEL FAILED TO PRESENT TO THE JURY THAT KAMAL BEY WAS A KNOWN GANG MEMBER. PETITIONER'S APPEAL

COUNSEL WAS INEFFECTIVE AND PREJUDICED THIS PETITIONER BY FAILING TO RAISE THE FOLLOWING ISSUES ON APPEAL:

1) APPELLATE COUNSEL FAILED TO RAISE A FRANKLIN ISSUE ON DIRECT APPEAL. 2) APPELLATE COUNSEL FAILED TO RAISE THAT TRIAL COUNSEL FAILED TO REQUEST AN ILLEGIBLE INSTRUCTION FROM THE TRIAL COURT. 3) APPELLATE COUNSEL FAILED TO RAISE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ON DIRECT APPEAL. 4) APPELLATE COUNSEL FAILED TO RAISE THE ISSUE THAT THERE WAS PROSECUTORIAL MISCONDUCT WHEN THE PROSECUTOR FAILED TO INFORM THE JURY THAT KAMAL BEY WAS A SUSPECT AND ALSO CO-DEFENDANT. 5) APPELLATE COUNSEL FAILED TO RAISE THE ISSUE THAT KAMAL BEY'S TESTIMONY WASN'T TRUST WORTHY DUE TO THE FACT THAT KAMAL BEY WAS A CO-DEFENDANT.

COUNSEL'S FAILURE TO DO THE ABOVE PREJUDICED THIS PETITIONER AND DENIED HIM A FAIR AND IMPARTIAL TRAIL, [sic] AS WELL AS HIS 6th AND 14th AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL DURING ALL CRITICAL STAGES OF A CRIMINAL PROCEEDING AND DIRECT APPEAL.

(3) Statement of Exhaustion of State Remedies as to Ground One:

Direct Appeal

(a) If you appealed from the judgement of conviction did you raise this issue?
Yes [ ] No [ ]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: _____

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court?
Yes [XX] No [ ]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: WRIT OF HABEAS CORPUS POST CONVICTION (PURSUANT TO 177.315 ET. SEQ. THE 8th JUDICIAL COURT DISTRICT OF CLARK COUNTY. DENIED 2-11-93

(e) Did you receive an evidentiary hearing on your motion or petition?
Yes [ ] No [XX]

(f) Did you appeal from the denial of your motion or petition?
Yes [XX] No [ ]

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal,

Yes [ ] No [ ],

and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): IN THE SUPREME COURT OF THE STATE OF NEVADA CARSON CITY, NV. CASE NO. 25088 DEC. 30, 1993

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: _____

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: _____

B)(1) Ground Two: THE TRIAL COURT VIOLATED PETITIONER'S 6th AND 14th AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL TRIAL.

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

THE TRIAL COURT DEPRIVED THE PETITIONE [SIC] OF HIS RIGHTS TO A FAIR AND IMPARTIAL TRIAL. WHEN THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY ON ACCOMPLICE'S TESTIMONY.

(3) Statement of Exhaustion of State Remedies as to Ground Two:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue?

Yes [ ] No [ ]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not:

_____

Post-conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court?

Yes [XX] No [ ]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the result and date of the court's decision: WRIT OF HABEAS CORPUS (POST-CONVICTION PURSANT [SIC] TO 177.315 ET. SEQ), THE 8TH JUDICAL [SIC] DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK LAS VEGAS, NV. DENIED 2-11-93

(e) Did you receive an evidentiary hearing on your motion or petition?

Yes [ ] No [XX]

(f) Did you appeal from the denial of your motion or petition?

Yes [XX] No [ ]

(g) If your answer to (f) is "yes", state whether this issue was raised in the appeal,

Yes [ ] No [ ],

and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): IN THE SUPREME COURT OF THE STATE OF NEVADA CARSON CITY, NEVADA. DISMISSED ON DEC. 30, 1993

(h) If your answer to questions (e), (f) or (g) is "no", briefly explain: _____

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: _____

c)(1) Ground Three: THERE WAS PROSECUTORIAL MISCONDUCT IN PETITIONER'S CASE THAT PREJUDICED PETITIONER

(2) Supporting Facts: (Without citing legal authority or argument state briefly the facts which support your claim.)

THE PROSECUTION WITHHELD FROM JURY THAT THE ONLY FINGERPRINTS FOUND ON THE MURDER WEAPON WERE KAMAL BEY, ALSO THAT HE WAS A CO-DEFENDANT IN THE CASE.

(3) Sttement [sic] of Exhaustion of State Remedies as to Ground Three:

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue?

Yes [ ] No [XX]

(b) If you did not raise this issue in your direct appeal, explain briefly why you did not: ATTORNEY OF RECORD DID NOT RAISE THIS ISSUE ON DIRECT APPEAL.

Post-Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court?

Yes [XX] No [ ]

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the the [sic] court where the motion or petition was filed, the result and date of the court's decision: WRIT OF HABEAS CORPUS (POST-CONVICTION

PURSUANT TO 177.315 ET. SEQ.) THE 8th JUDICIAL COURT COUNT [sic] OF CLARK, NEV. 2-11-93

(e) Did you receive an evidentiary hearing on your motion or petition?

Yes [ ] No [XX]

(f) Did you appeal from the denial of your motion or petition?

Yes [XX] No [ ]

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal,

Yes [ ] No [ ]

and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order): THE SUPREME COURT OF NEVADA CARSON CITY, NV DISMISSED DEC. 30, 1993

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain: _____

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue: _____

15) Have all grounds for relief raised in this petition been presented to the highest state court having jurisdiction?

Yes [XX] No [ ]

16) If you answered "No" to question 15, state which grounds have not been so presented and briefly give your reason(s) for not presenting them:

_____

17) Have you previously filed any type of petition, application or motion in a federal court regarding the conviction under attack?

Yes [XX] No [ ]

If "Yes", state the location of the court, the type of proceeding, the issues raised, the result and the date of the court's decision for each petition, application or motion filed: U.S. DISTRICT COURT, DISTRICT OF NEVADA. 1) INSUFFICIENT EVIDENCE WAS ADDUCED AT TRIAL TO CONVICT; 2) TRIAL COURT IMPROPERLY ALLOWED PREJUDIAL [SIC] EVIDENCE OF PRIOR SEXUAL RELATIONS; 3) THE REASONABLE DOUBT INSTRUCTION VIOLATED DUE PROCESS; 4) PREMEDITATION WAS IMPROPERLY DEFINED TO JURY. PETITION FOR WRIT OF HABEAS CORPUS, PURSANT [SIC] TO 28 U.S.C. 2254 DISMISSED WITHOUT PREJUDICE FEBRUARY 19, 1992.

18) Do you have any petition, application, motion or appeal now pending in any court regarding the conviction under attack?

Yes [XX] No [ ]

If "Yes", state the name of the court and the nature of the proceeding: UNITED STATES DISTRICT COURT; PETITION OF WRIT OF HABEAS CORPUS PURSANT [SIC] TO 28 U.S.C. 2254 CASE NO. CV-N-91-561-HDM.

19) Were you represented by an attorney at any time during the course of your arraignment and plea, trial (if any), sentencing, appeal (if any), or during

the preparation, presentation or consideration of any petitions, motions or applications which you filed with respect to this conviction?

Yes [XX] No [ ]

If "Yes", state the name(s) and address(es) of any such attorney(s), the proceedings in which you so represented and whether said attorney(s) was/were of your own choosing or if appointed by the court: R. MICHAEL GARDNER, DPD; TRIAL & APPEAL 309 S. THIRD STREET LAS VEGAS NV. 89155 VICTOR AUSTIN, DPD, ARRAIGNMENT AND PLEA 309 S. THIRD STREET LAS VEGAS, NV. 89155 R. MICHAEL GARDNER DPD, SENTENCING 309 S. THIRD STREET LAS VEGAS, NV. 89155 COUNSEL'S APPOINTED BY THE COURT.

Wherefore, petitioner prays that the court grant him such relief to which he may be entitled in this proceeding.

/s/ Antonio T. Slack
Signature of Petitioner

Signature of Attorney
(if any)

Attorney's full address
and telephone number.)

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is the petitioner in the above action, that he has read the above pleading and that the information contained therein is true and correct. 28 U.S.C. § 1746. 18 U.S.C. § 1621.

Executed at Ely State Prison (Location) on March 19, 1995 (Date)

/s/ Antonio T. Slack
(Signature)

ANTONIO T. SLACK #31395
P.O. BOX 1989
ELY, NEV. 89301

IN PER SE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, v DIRECTOR, NDOP, ET AL., Respondant.	Case No. CV-N-95-194-DWH MOTION FOR APPOINTMENT OF COUNSEL

COMES NOW petitioner, Antonio T. Slack, proceeding in per se, with the assistance of an inmate law clerk, Illegible # Illegible, and hereby moves this court for its order appointing counsel in this Habeas Corpus Writ action.

This motion is made in good faith and based upon 28 U.S.C. Sec. 1915(D) and 18 U.S.C. Sec. 3006A(9) and is further made and based upon these pleadings and papers on file herein and affidavit.

DATED this ___ day of June, 1995.

Respectfully submitted,

/s/ Antonio T. Slack
ANTONIO T. SLACK #31395
P.O. Box 1989
Ely Nev. 89301

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, v DIRECTOR, NDOP, ET AL., Respondent.	CASE NO. CV-N-95-194-DWH AFFIDAVIT OF PETITIONER

I, ANTONIO T. SLACK, hereby swear under the penalty of perjury appear under oath and state that:

1) Petitioner is indigent and cannot afford to pay for an attorney to represent him in this matter.

2) Petitioner is illiterate and incompetent with the knowledge of litigating the law.

3) Petitioner has been receiving assistance from inmate law clerks assigned to NDOP's law libraries on his case.

4) Petitioner's case has merit and a good chance of sucess [sic] with the assistance of an attorney, for the Nevada Bar Association and American Bar Association.

DATED This ___ day of ___, 1995

/s/ _____
ANTONIO T. SLACK #31395

Respectfully Written and
Submitted,

/s/ Mr. Antonio T. Slack
ANTONIO T. SLACK 31395
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

Written and signed on the ____ day of June 1995.

Certificate of Service

I, Antonio T. Slack, an Ely State Prisoner on the ____ day of June, 1995, have placed in the United States mail a true and correct copy of this letter addressed to the following:

Frankie Sue Del-Papa/ATTORNEY GENERAL
Heroes' Memorial Building
Capital Complex
Carson City, Nevada 89301

/s/ _____
Antonio T. Slack #31395
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

ANTONIO T. SLACK #31395
P.O. BOX 1989
ELY, NEV. 89301

IN PER SE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, v DIRECTOR, NDOP, ET AL., Respondant.	CASE NO. CV-N-95-194-DWH ORDER APPOINTING COUNSEL

PETITIONER, an Ely State Prisoner appearing in per se and in Forma Pauperis requesting appointment of counsel.

Good Cause Appearing.

IT IS THEREFORE, HEREBY ORDERED that counsel is appointed for petitioner.

DATED this ____ day of ____, 1995

/s/ _____
UNITED STATES DISTRICT
JUDGE

CERTIFICATE OF SERVICE

I, ANTONIO T. SLACK, an inmate at Ely State Prison on this ____ day of ____, 1995. I served a true copy of the foregoing MOTION FOR APPOINTMENT OF COUNSEL, ORDER AND AFFIDAVIT by placing a copy in the United States Postal mail to the following:

FRANKIE SUE DEL PAPA
ATTORNEY GENERAL
HEROES' MEMORIAL BUILDING
CAPITAL COMPLEX
CARSON CITY, NEVADA 89710

/s/ _____
ANTONIO T. SLACK #31395
ELY STATE PRISON
POST OFFICE BOX 1989
ELY NEVADA 89301

FRANKIE SUE DEL PAPA
Attorney General
ROBERT E. WIELAND
Deputy Attorney General
Criminal Justice Division
Capitol Complex
Heroes' Memorial Building
Carson City, Nevada 89710
Telephone: (702) 687-3529

Attorney for Respondents.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, vs. DIRECTOR, NDOP, et al., Respondents.	)	Case No. CV-N-95-194-DWH **OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL**

Respondents, by an [sic] through counsel, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, oppose petitioner's motion for appointment of counsel.

This opposition is made and based on the attached points and authorities as well as all other pleadings, documents and exhibits on file in the above-entitled matter.

POINTS AND AUTHORITIES

Petitioner Antonio T. Slack (hereinafter SLACK) has filed a motion for counsel stating that he is illiterate. This

assertion is belied by the pleadings that Slack has already filed in this matter. Slack acknowledges that he is receiving the benefit of the services of inmate law clerks. He is entitled to nothing more. Whether his claims have merit or not is up to this Court to determine. Slack is not constitutionally entitled to counsel in this proceeding and he has advance no reason why he can not litigate the matter himself. Respondents respectfully suggest that this Court should not waste scarce judicial resources.

RESPECTFULLY SUBMITTED this 7th day of July, 1995.

FRANKIE SUE DEL PAPA
Attorney General

By: /s/ Robert E. Wieland
Robert E. Wieland
Deputy Attorney General
Criminal Justice Division
(702) 687-3529

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and on this 10th day of July, 1995, I served a copy of the foregoing OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL, by mailing a copy thereof to:

ANTONIO T. SLACK, #31395
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

/s/ Traci R. Dory

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, vs DIRECTOR, NDOP, et al., Respondents	)	Case No. CV-N-95-194-DWH
	)	ORDER
	)	(Filed Feb. 29, 1996)

Respondents have filed a motion to dismiss the petition in this action (#15). Petitioner has failed to oppose the motion. Petitioner is hereby instructed to file points and authorities in opposition to the motion or respondents' motion will be granted. *See* Local Rule 110-2.

Petitioner has also moved for appointment of counsel (#8), which at this time will be denied.

IT IS THEREFORE ORDERED that Petitioner shall have twenty (20) days from the date of this order within which to file points and authorities in opposition to the motion. After petitioner's said response to the motion is filed, respondents shall thereafter have fifteen (10) [sic] days within which to file a reply. If petitioner fails to respond to this order, the motion will be deemed consented to and granted.

IT IS FURTHER ORDERED that petitioner's motion for appointment of counsel (#8) is *DENIED*.

DATED this 29th day of February, 1996.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, -vs- DIRECTOR, NDOP, et al., Respondents.	)	Case No. CV-N-95-194-DWH MOTION FOR APPOINTMENT OF COUNSEL (Filed Dec. 31, 1996)

Petitioner ANTONIO T. SLACK, pursuant to U.S.C. Section 3006 A(g), requests this Court to appoint counsel to represent him in this habeas petition for the following reasons:

1) Petitioner is not able to afford counsel. *See:* Motion To Proceed *In Forma Pauperis*, on file herein;

2) The issues in this case are complex;

3) The issues involved in this case will require investigation which the Petitioner cannot do while confined in prison;

4) The prison limits the hours that the Petitioner may have access to the law library and the materials contained there are very limited;

5) Petitioner has a very limited knowledge of the law, and;

6) The ends of justice would best be served in this case if an attorney was appointed to represent the Petitioner.

Petitioner has contacted an attorney who is willing to accept an appointment to represent him in this matter.

See: (Attached) copy of letter from Joan D. Buckley, Esq. *Also see:* (Attached) affidavit of Petitioner. Ms. Buckley not only has expressed an interest in being appointed to represent Petitioner in this matter, but also possesses some knowledge of the issues herein.

THEREFORE, Petitioner respectfully requests this Honorable Court to appoint Ms. Buckley to represent him herein, or to appoint the Federal Public Defenders' Office should the Court be hesitant to name Ms. Buckley. *See:* (Attached) PROPOSED ORDER.

Dated Dec. 23, 1996

/s/ Antonio T. Slack
Antonio T. Slack
Ely State Prison
P. O. Box 1989
Ely, Nevada 89301

CERTIFICATE OF MAILING/SERVICE

I, Antonio T. Slack, hereby certify that on this date I served, by U.S. mail, a true and correct copy of this pleading with its attachments, to the following persons:

Frankie Sue Del Papa
Nevada Attorney General
Office of the Attorney General
Capitol Complex
Carson City, Nevada 89710

Joan D. Buckley, Esq. (Proposed Counsel)
302 E. Carson
Suite 508
Las Vegas, Nevada 89101

Dated Dec. 23, 1996

/s/ Antonio T. Slack
Antonio T. Slack

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, -vs- DIRECTOR, NDOP, et al., Respondents.	)	Case No. CV-N-95-194-DWH AFFIDAVIT IN SUPPORT OF MOTION FOR APPOINTMENT OF COUNSEL

STATE OF NEVADA WHITE PINE COUNTY	) ss.	AFFIDAVIT OF ANTONIO T. SLACK

I, Antonio T. Slack, considering myself duly sworn and under oath, pursuant to 28 U.S.C. Section 1746, hereby state under the penalty of perjury:

1) That I am the Petitioner in the above entitled PETITION FOR WRIT OF HABEAS CORPUS, am of sound mind and over the age of 21, and am competent to testify to all matters herein;

2) That the MOTION FOR APPOINTMENT OF COUNSEL (to which this affidavit is attached) is made for the following reasons:

a) I am an indigent state prisoner, confined in prison and thus cannot to [sic] retain counsel at my own expense. I have previously been granted full *in forma pauperis* status by this Court;

b) The issues involved in this case are complex, and require the services of an experienced attorney to effectively present them to this Court and I am not well enough versed in law to adequately present them;

c) That to adequately present to the Court the issues in this matter, investigation(s) would have to be made which this incarcerated Petitioner is not capable of;

d) The institution where Petitioner is confined has a very limited law library program. Access times are inadequate to conduct meaningful research and necessary research materials are either missing or not even 'stocked' in the library;

e) The interests of justice and due process dictate that appointed counsel is warranted in this case, given the complex issues and Petitioner's incarceration.

3) That I have contacted Joan D. Buckley, Esq. concerning this case, and she has agreed to accept appointment to the case by this Court.

FURTHER AFFIANT SAYTH [sic] NAUGHT

I declare and verify under penalty of perjury that the foregoing is true and correct to the best of my own personal knowledge or belief.

Dated Dec. 23, 1996

/s/ Antonio T. Slack
Antonio T. Slack
Ely State Prison

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, -vs- DIRECTOR, NDOP, et al., Respondents.	)	Case No. CV-N-95-194-DWH ORDER APPOINTING COUNSEL

HAVING CONSIDERED PETITIONER'S MOTION FOR APPOINTMENT OF COUNSEL, and good cause appearing,

IT IS HEREBY ORDERED that Joan D. Buckley, Esq., 302 E. Carson, Suite 508, Las Vegas, Nevada 89101, is appointed to represent and assist Petitioner in the above entitled petition for writ of habeas corpus.

David W. Hagen
District Court Judge

FRANKIE SUE DEL PAPA
Attorney General
ROBERT E. WIELAND
Deputy Attorney General
Criminal Justice Division
Capitol Complex
Carson City, Nevada 89710
Telephone: (702) 687-3529

Attorney for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, vs. DIRECTOR, NDOP, et al., Respondents.	)	Case No. CV-N-95-194-DWH OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL

Respondents, by and through counsel, Frankie Sue Del Papa, Attorney General of the State of Nevada, oppose petitioner's motion for appointment of counsel. This opposition is made and based on the attached points and authorities as well as all other pleadings, documents and exhibits on file in the above-entitled matter.

ARGUMENT

Petitioner Antonio T. Slack (hereinafter Slack) has filed a motion for the appointment of counsel. Slack claims that he has contacted an attorney who would

accept an appointment to represent him. Slack claims that access to the prison library is limited, that he has limited knowledge of the law, and that the issues that he presents in this case are complex and will require investigation. None of the representations made by Slack justify the appointment of counsel.

18 U.S.C. § 3006A(a)(2)(B) gives the district court discretion to appoint counsel when it determines that the "interests of justice" require representation. Counsel must be appointed if an evidentiary hearing is required. Rule 8, 28 U.S.C. foll. § 2254; *Bashor v. Risley*, 730 F.2d 1228 at 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984). Otherwise, appointment of counsel rests with the district court's discretion. A district court abuses its discretion in declining to appoint counsel if due process violations will occur absent representation. *Bonin v. Vasquez*, 999 F.2d 425, 429 (9th Cir. 1993).

Slack has no constitutional right to counsel in a federal habeas corpus proceeding. *See Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830 (1985); *Knaubert v. Goldsmith*, 791 F.2d 722, 729 (9th Cir.), *cert. denied*, 479 U.S. 867 (1986).

Whether or not the issues in this case will require investigation remains to be seen. Contrary to Slack's assertion, the issues presented in this action are not complex. Slack does not aver that his limited access to the prison law library falls below constitutional requirements or that the materials contained therein fall below constitutional requirements. Slack has made no averment that any limitation prevented him from litigating this action. That Slack has limited knowledge of the law does not require this Court to appoint counsel for him. None of the

representations made by Slack, even if true, either singly or taken as a whole either justify or require this Court to appoint counsel for Slack.

Based upon the foregoing, Respondents respectfully submit this Court should deny Slack's motion for the appointment of counsel.

RESPECTFULLY SUBMITTED this 9th day of January, 1997.

/s/ FRANKIE SUE DEL PAPA
Attorney General

By: /s/ Robert E. Wieland
ROBERT E. WIELAND
Deputy Attorney General
Criminal Justice Division
(702) 687-3529

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and on this 9th day of January, 1997, I served a copy of the foregoing OPPOSITION TO MOTION FOR APPOINTMENT OF COUNSEL, by mailing a copy thereof to:

ANTONIO T. SLACK, #31395
Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

/s/ Dorene A. Wright

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, vs DIRECTOR, NDOP, et al., Respondents.	)	Case No. CV-N-95-194-DWH ORDER APPOINTING COUNSEL (Filed Feb. 13, 1997)

The motion for leave to proceed *in forma pauperis* shows that petitioner lacks the resources necessary to employ counsel to prosecute this habeas corpus proceedings in which he attacks the validity of his conviction and sentence. It appears to be in the best interest of justice that counsel be appointed to represent petitioner herein. Therefore, petitioner named above being financially unable to employ counsel, and because the interests of justice so require, the Federal Public Defender for the District of Nevada shall be appointed to represent petitioner.

Counsel for petitioner shall contact petitioner within twenty (20) days and: (a) review the procedures applicable in cases under 28 U.S.C. § 2254; (b) discuss and explore with petitioner, as fully as possible, the potential grounds for habeas corpus relief in Petitioner's case; and (c) advise petitioner that all possible grounds for habeas corpus relief should be raised at this time, and that the failure to do so may result in loss of the omitted grounds under the rules regarding abuse of the writ.

IT IS THEREFORE **ORDERED** that petitioner's Motion for Appointment of Counsel is GRANTED to the extent that the Federal Public Defender for the District of Nevada is hereby appointed to represent petitioner in these proceedings. The Clerk of the Court shall send a copy of this order to the Federal Public Defender with a copy of the amended petition for writ of habeas corpus (#31).

IT IS FURTHER **ORDERED** that counsel for petitioner shall file an amended petition for writ of habeas corpus within forty-five (45) days or a notice to the court indicating his or her intent to proceed with the current amended petition (#31).

IT IS FURTHER **ORDERED** that respondents' Motion for Enlargement (#42) is DENIED as moot.

IT IS FURTHER **ORDERED** that petitioner's Motion for Judgment on the Pleadings (#38) is DENIED. Such a motion is inappropriate until the pleadings have closed.

Dated this 13th day of February, 1997.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

FRANNY A. FORSMAN
Federal Public Defender
DEBORAH A. TREVINO
Assistant Federal Public Defender
Attorney for Petitioner
330 South Third Street, Suite 700
Las Vegas, NV 89101

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, vs. E.K. McDaniel, Warden, Ely State Prison, and The Attorney General of the State of Nevada, Respondents	**CASE NO.** CV-N-95-194-DWH **THIRD AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. 2254 BY A PERSON IN STATE CUSTODY (NOT SENTENCED TO DEATH)** (Filed 97 Dec 24)

Petitioner alleges as follows:

1. The challenged conviction was entered in the District Court for the Eighth Judicial District of Nevada, Las Vegas, Nevada, Hon. Earl White, presiding.

2. Judgment of conviction was entered May 16, 1990.

3. An appeal was filed with the Nevada Supreme Court; the appeal was decided November 5, 1991.

4. A petition for post-conviction relief was filed on July 10, 1992 in the Eighth Judicial District Court. The court denied the petition on September 2, 1992 and an appeal was taken: the appeal was decided on December 30, 1993.

5. One previous petition for relief was filed pursuant to 28 U.S.C. §2254 in Case No. CV-N-91-561-HDM. It was dismissed without prejudice on February 19, 1992.

6. No other pleadings or actions are pending in any other court.

7. Petitioner was convicted by jury trial of second degree murder with the use of a deadly weapon in Case No. C-89-92060. Petitioner received two consecutive sentences of life with the possibility of parole. Petitioner began serving his sentence on May 16, 1990.

8. Petitioner was represented by the following attorneys in state court:

Pre-trial and Trial: Deputy Public Defenders Victor Austin and Michael Gardner

Appeal: Deputy Public Defender Michael Gardner (brief); Public Defender Steve Dahl (oral argument).

Post-conviction Petition: Pro Se

Appeal from Denial of Post-conviction relief: Pro Se

FACTUAL SUMMARY

9. Petitioner was charged with killing Alanna Holmes on November 4, 1989. Ms. Holmes died as a result of a shotgun wound. Petitioner admitted, at trial to shooting Ms. Holmes with a shotgun but asserted that the shooting was accidental. Antonio Slack admitted that he shot and was responsible for the death of the decedent Alanna Holmes.

STATEMENT OF PRIOR PROCEEDINGS

10. The Judgment of Conviction-Case No. C89-92060

Petitioner challenges his conviction imposed in Criminal Case No. C89-92960 in the Eighth Judicial District Court for the State of Nevada, in and for the County of Clark. Slack pleaded not guilty and was convicted following a jury trial. Sentence was imposed for second degree murder with the use of a deadly weapon. Slack was sentenced to the Nevada state prison for a term of life with the possibility of parole (second degree murder) and a consecutive term of life with the possibility of parole (use of a deadly weapon).

11. The Direct Appeal-Nevada Supreme Court Docket No. 21421

An appeal was taken to the Nevada Supreme Court raising the following issues:

Issue One: Whether insufficient evidence was adduced at trial to convict the defendant of second degree murder with use of a deadly weapon?

Issue Two: Whether the trial court improperly allowed prejudicial evidence of a sexual relationship between the defendant and the twelve year old victim?

Issue Three: Whether the reasonable doubt jury instruction given by the trial court violated the due process clause of the United States and Nevada constitution?

Issue Four: Whether the court erred by not adequately defining premeditation in the jury instructions regarding murder?

On September 11, 1991, Deputy Public Defender Steve Dahl argued petitioner's direct appeal before the Nevada Supreme Court. Mr. Dahl did not author the appellate brief. At oral argument, Mr. Dahl indicated that he would present argument only on Issue Two. On November 5, 1991, the Nevada Supreme Court issued an order dismissing the appeal.

12. State Petition for Writ of Habeas Corpus (Post Conviction) *Slack v. State of Nevada*, Case No. C-92960

On July 10, 1992, petitioner, in proper person, filed a Post Conviction Petition for Writ of Habeas Corpus in the Eighth Judicial District Court. The petition raised the following grounds:

Ground One: Petitioner was denied his Sixth Amendment right to effective assistance of counsel pre-trial and at trial.

Ground Two: Petitioner was denied his Sixth Amendment right to effective assistance of counsel on direct appeal.

Ground Three: The trial court violated petitioner's Sixth and Fourteenth Amendment rights to a fair and impartial trial.

Ground Four: There was prosecutorial misconduct in petitioner's trial that prejudiced petitioner.

The petition for post conviction relief was denied in District Court, Clark County, Nevada on September 2, 1992. A formal order memorializing the court's decision was filed on February 11, 1993.

13. Appeal from order denying state Petition for Habeas Corpus (Post-Conviction) *Slack v. State of Nevada,* Case No. C-92060.

On December 30, 1993, the Nevada Supreme Court entered an Order dismissing the appeal from the denial of post conviction relief. Exhibit 3.

GROUNDS FOR RELIEF

15. **Ground One:**

Insufficient evidence was adduced at trial to support a conviction for the crime of Second degree murder in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Slack admitted that he shot and was responsible for causing the death of decedent, Alanna Holmes. He maintained before and throughout trial that the shooting was accidental. No motive was ever established for the shooting. Although Mr. Slack told different versions of the events leading up to the shooting, he consistently maintained that the death of Alanna Holmes was an accident. He testified that the inconsistencies in his prior statements were motivated primarily by fear, youth and inexperience.

The government failed to present any evidence that the shooting was not accidental. The government called only one expert witness, Dr. Sheldon Green, chief medical examiner in the Clark County coroner's office. On direct examination, Dr. Green rendered an opinion that the shooting was inconsistent with an accidental *self inflicted* shooting when asked whether the death was

accidental. He indicated that accident was a possibility but then volunteered that his scientific opinion was influenced by "the circumstances of discovery and what other information". CR 15 at Exhibit 9. The prosecutor did nothing to clear up this obvious confusion and the jury was left with the misapprehension that his testimony concerned the scientific possibility of an accidental death not an accidental self-inflicted injury. No other proof was adduced which showed that the shooting was other than accidental.

Statement of Exhaustion

This ground was raised on direct appeal and in state post-conviction proceedings.

16. **Ground Two:**

Petitioner was Denied His Right to Due Process Under the Fifth and Fourteenth Amendment because he was charged with "open murder" in an information which did not properly plead each element of first degree murder thus failing to impart sufficient notice to him.

Petitioner was charged with "open murder" by information filed on December 29, 1989. CR 15 at Exhibit 3. That information read in pertinent part: "That Antonio Tonton Slack, on or about the 4th day of November, 1989 . . . did then and there, without authority of law and with malice aforethought, wilfully and feloniously kill, ALANNA HOLMES, a human being, by shooting at and into the body of the said ALANA [sic] HOLMES, with a deadly weapon, to-wit: a firearm". The information made no mention of premeditation and deliberation required

by Nev. Rev. Stat. 200.300(2) (definition of first degree murder). Nonetheless, the jury was instructed on first degree murder and the prosecutor argued for a first degree murder conviction.

The information did not place petitioner on notice that, under Nevada law, the state was required to show that he committed the homicide with premeditation and deliberation. Accordingly, his rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated. Moreover, the charging document did not allege any facts to support the allegation that Mr. Slack committed the crime with the requisite premeditation and deliberation.

Statement of Exhaustion: This ground was not raised either on direct appeal or in state post-conviction proceedings.

17. **Ground Three:**

The defendant's right to a fair trial was destroyed by the introduction of evidence of sexual misconduct designed to prejudice the jury in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The trial court improperly allowed the prosecutor to ask the defendant whether he had sexual intercourse with the twelve year old decedent. Mr. Slack was nineteen at the time of his trial. The State did not allege nor did it attempt to prove that the shooting involved an attempted rape or any other improper sexual conduct or motivation. In fact, the prosecutor emphasized during his closing argument that "I'm not trying to say this was a

rape. Its very obvious this little girl had an infatuation, a crush on the defendant." CR 15 at Exhibit 10.

The implication that Mr. Slack had sexual intercourse with the decedent was not relevant to the issues to be decided by the jury at trial. However, the prosecutor's question was so prejudicial that it could serve no other purpose but to inflame the jury to the irreparable detriment of the defendant's right to a fair trial. The mere suggestion that Slack may have had sexual intercourse with a twelve year old girl made it more likely than not that the jury would not properly weigh the evidence. The trial court's failure to exclude evidence with highly prejudicial value and no relevance resulted in a fundamentally unfair and unjust trial and verdict.

Statement of Exhaustion: This claim was raised on direct appeal and in state post-conviction proceedings.

18. **Ground Four:**

The trial court failed to properly instruct the jury in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

A. The reasonable doubt instruction was unconstitutional.

The reasonable doubt instruction was unconstitutional because it minimized the state's burden of proof. The trial court gave the following jury instruction defining reasonable doubt:

> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors,

> after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual and substantial, nor merely possibility or speculation. CR at Exhibit 11.

The above instruction inflates the constitutional standard necessary for acquittal, and giving of this instruction created a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than constitutionally required.

The principle defect of the instruction is the second sentence: "reasonable doubt" is not mere possible doubt, but is such doubt as would govern or control a person in the more weighty affairs of life." This language is an appropriate characterization of the degree of certainty required to find proof beyond a reasonable doubt, rather than the standard of reasonable doubt itself. This language is also an historical anomaly; as far as can be determined, no other state currently uses the "govern or control" language in its reasonable doubt instruction, and the few states that previously used it have since disapproved it.

The final sentence of the instruction is also constitutionally infirm. That sentence states "doubt to be reasonable must be actual and substantial, not mere possibility or speculation." The language is functionally identical to language condemned by the United States Supreme Court and, when read in combination with the "govern or control" language, creates a reasonable likelihood that the jury would convict and sentence based on a

lesser standard of proof than the Constitution requires. This structural error is *per se* prejudicial and no showing of specific prejudice is required.

Statement of Exhaustion: This claim was raised on direct appeal and in state post-conviction proceedings.

B. The premeditation and deliberation instruction was unconstitutional.

The trial court gave the following instruction:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of mind. For if the Jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

CR 15 at Exhibit 11.

By injecting the concept of "instantaneous" premeditation and deliberation into this proceeding, the giving of this instruction created a reasonable likelihood that the jury would convict and sentence on a charge of first degree murder without any rational basis.

Despite the requirement that first degree murder be both "premeditated and deliberate", the jury that convicted Mr. Slack was instructed in a manner that read the

dual elements as a single term, and deprived those elements of all substantive content beyond the definition of an intent to kill. By so confusing these terms, the instruction failed to provide the jury with any rational or meaningful guidance as to the concept of "premeditation and deliberation".

The vague "premeditation and deliberation" instruction given in Mr. Slack's trial (which does not require any sort of *pre*meditation at all) violated the constitutional guarantee of due process of law because it is so bereft of meaning as to the definition of two elements of the offense of first degree murder as to allow unlimited prosecutorial discretion in charging decisions. This instruction also left the jury without adequate standards by which to assess culpability and made the ability to defend against these charges virtually impossible, due to the inability to discern what the government needs to prove to establish the elements of the charged offense.

The prosecutor focused on the "premeditation and deliberation" instruction by stating during closing argument:

> "Some people come into a murder trial with the notion that premeditation is something you have to plan weeks ahead of time. There has to be a certain time interval wherein the party decides to kill and he in fact kills. Instruction No. 8 given to you by the court dispels that notion. It informs you in paragraph one that premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing. Then his honor goes on to say in paragraph two beginning at line six, 'premeditation need not be

> for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind.' The key issue is that the defendant, for whatever reason, for whatever motivation, decided to kill either at the time or immediately before he inflicted the fatal wound. Undoubtedly what happened on an impulse, a decision was made in the bedroom after he went into the bedroom . . . The point I'm making is that the definition of premeditation is a design, a determination to kill. But you don't have to form that at any set period before the fatal blow or wound is inflicted. It may be as instantaneous as successive thoughts of the mind. CR 15 at Exhibit 10.

Statement of Exhaustion: This claim was raised on direct appeal and in state post-conviction proceedings.

C. The malice aforethought instruction was unconstitutional.

The jury was given the following instruction on "malice aforethought":

> Express Malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.
>
> Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned or malignant heart.

The giving of this instruction deprived Mr. Slack of his constitutional rights by creating a reasonable likelihood that the State would be relieved of its burden to prove each element of the offense beyond a reasonable

doubt. Such an instruction subverted the presumption of innocence afforded to accused persons and also invaded the truth-finding task of the jury.

The primary failing of the "implied malice" instruction is that it created a mandatory presumption that malice shall be implied both in the absence of provocation and when the circumstances of the killing show "abandoned or malignant heart". This explicit and unqualified command directly foreclosed independent jury consideration of whether the facts established "malice aforethought" an essential element of the offenses with which Mr. Slack was charged.

The instruction also poses substantial problems with respect to the specified "basic-facts" – lack of provocation or an "abandoned and malignant heart" – from which malice shall be implied. These supposed circumstances are so cryptic and metaphysical that they are meaningless without further definition. Such language might also easily permit a jury to equate malignant heart with an evil disposition or despicable character, which could then lead the jury, especially in a close case, to find the existence of malice aforethought because it believes the accused to be a bad person.

The giving of the unconstitutional "implied malice" instruction substantially and injuriously affected the process to such an extent as to render Mr. Slack's conviction and sentence fundamentally unfair. The State cannot show, beyond a reasonable doubt that this instruction did not affect the conviction.

Statement of Exhaustion: This claim was not raised on direct appeal nor in state post-conviction proceedings.

19. **Ground Five:**

Petitioner was denied the effective assistance of trial counsel in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution

A. Trial counsel failed to take any action to prevent the introduction of highly prejudicial evidence of sexual contact between the defendant and the 12 year old decedent.

Pursuant to pre-trial discovery, trial counsel was on notice that the government claimed that petitioner, during interrogation, told a North Las Vegas police officer that he had sexual intercourse with the decedent, Alanna Holmes on one occasion on October 31, 1989. Nonetheless, trial counsel failed to attempt to exclude such evidence prior to trial. Had counsel filed such a motion, he would have received a ruling pre-trial as to whether the trial court would permit this highly prejudicial and inflammatory evidence. By seeking such a ruling in advance of trial, counsel would have been able to effectively advise his client whether to testify on his own behalf or whether to proceed to trial at all rather than pursue a negotiated plea. Trial counsel did not have a tactical or strategic reason for failing to seek a pre-trial ruling on the admissibility of this highly prejudicial and irrelevant evidence.

In fact, the performance of trial counsel was so deficient that he failed to protect against "opening the door" during direct examination of the petitioner. During direct examination trial counsel elicited the following:

Q Did you have a relationship of boyfriend and girlfriend?

A No

On cross examination, the prosecutor impeached petitioner with the following:

Q You testified on direct examination that you did not have a boyfriend/girlfriend relationship with Alanna Holmes?

A Yes

Q How long had you known her?

A I'd say around three months?

Q Around three months?

A Yes

Q You knew her on Halloween, 1989, didn't you?

A Yes

Q What do you mean by boyfriend/girlfriend relationship?

A Just like if we go together. Like if say you was a girl and I asked you would you want to go steady, like going steady, then that's what I call boyfriend/girlfriend relationship?

Q If I was a girl and I let you do certain things with my body, would that make me your girlfriend?

A Sometimes

Q Did you do something with Alanna Holmes on Halloween 1989?

A No

Q You didn't tell the North Las Vegas Police Department that you had sex with her on Halloween 1989?

Trial counsel permitted this entire line of questioning before objecting. By the time an objection was made, the damage was already done. The trial court permitted the testimony overruling the untimely objection because the defense had opened the door. Once this testimony was elicited, Mr. Slack's case was irreparably harmed. Counsel's failure to effectively prepare and conduct direct examination and to register a timely objection was a dereliction of his duty to perform as a reasonable and competent counsel. Trial counsel did not have a tactical or strategic reason for his failure.

B. Trial Counsel failed to object to the jury instruction given by the court on reasonable doubt.

The reasonable doubt instruction was unconstitutional because it minimized the state's burden of proof. The trial court gave the following jury instruction defining reasonable doubt:

> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable

> doubt. Doubt to be reasonable must be actual and substantial, not merely possibility or speculation. CR at Exhibit 11.

The above instruction inflates the constitutional standard necessary for acquittal, and the giving of this instruction created a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than constitutionally required.

The principle defect of the instruction is the second sentence: reasonable doubt "is not mere possible doubt, but is such doubt as would govern or control a person in the more weighty affairs of life." This language is an appropriate characterization of the degree of certainty required to find proof beyond a reasonable doubt, rather than the standard of reasonable doubt itself. This language is also an historical anomaly; as far as can be determined, no other state currently uses the "govern or control" language in its reasonable doubt instruction, and the few states that previously used it have since disapproved it.

The final sentence of the instruction is also constitutionally infirm. That sentence states "doubt to be reasonable must be actual and substantial, not mere possibility or speculation." The language is functionally identical to language condemned by the United States Supreme Court and, when read in combination with the "govern or control" language, creates a reasonable likelihood that the jury would convict and sentence based on a lesser standard of proof than the Constitution requires. This structural error is *per se* prejudicial and no showing of specific prejudice is required.

Trial counsel failed to interpose any objection to the unconstitutional instruction on reasonable doubt or to offer an alternative, constitutional instruction thus depriving him of his Sixth and Fourteenth Amendment right to effective assistance of counsel. Trial counsel could have had no tactical or strategic reason for failing to require the jury to be properly instructed.

C. Trial counsel failed to object to the jury instruction given by the court on premeditation and deliberation.

The trial court gave the following instruction:

> Premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing.
>
> Premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the Jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the premeditation is followed by the act constituting the killing, it is willful, deliberate and premeditated murder.

CR 15 at Exhibit 11.

By injecting the concept of "instantaneous" premeditation and deliberation into this proceeding, the giving of this instruction created a reasonable likelihood that the jury would convict and sentence on a charge of first degree murder without any rational basis.

Despite the requirement that first degree murder be both "premeditation and deliberate", the jury that

convicted Mr. Slack was instructed in a manner that read the dual elements as a single term, and deprived those elements of all substantive content beyond the definition of an intent to kill. By so confusing these terms, the instruction failed to provide the jury with any rational or meaningful guidance as to the concept of "premeditation and deliberation".

The vague "premeditation and deliberation" instruction given in Mr. Slack's trial (which does not require any sort of *pre*meditation at all) violated the constitutional guarantee of due process of law because it is so bereft of meaning as to the definition of two elements of the offense of first degree murder as to allow unlimited prosecutorial discretion in charging decisions. This instruction also left the jury without adequate standards by which to assess culpability and made the ability to defend against these charges virtually impossible, due to the inability to discern what the government needs to prove to establish the elements of the charged offense.

The prosecutor focused on the "premeditation and deliberation" instruction by stating during closing argument:

> "Some people come into a murder trial with the notion that premeditation is something you have to plan weeks ahead of time. There has to be a certain time interval wherein the party decides to kill and he in fact kills. Instruction No. 8 given to you by the court dispels that notion. It informs you in paragraph one that premeditation is a design, a determination to kill, distinctly formed in the mind at any moment before or at the time of the killing. Then his honor goes on to say in paragraph two

> beginning at line six, 'premeditation need not be for a day, an hour or even a minute. It may be as instantaneous as successive thoughts of the mind.' The key issue is that the defendant, for whatever reason, for whatever motivation, decided to kill either at the time or immediately before he inflicted the fatal wound. Undoubtedly what happened on an impulse, a decision was made in the bedroom after he went into the bedroom . . . The point I'm making is that the definition of premeditation is a design, a determination to kill. But you don't have to form that at any set period before the fatal blow or wound is inflicted. It may be as instantaneous as successive thoughts of the mind. CR 15 at Exhibit 10.

Trial counsel failed to interpose any objection to the unconstitutional instruction on premeditation and deliberation or to offer an alternative instruction thus depriving petitioner of his Sixth and Fourteenth Amendment rights to effective assistance of counsel. Trial counsel could have had no tactical or strategic reason for failing to protect the petitioner from an improperly instructed jury. The failure as to this issue is particularly prejudicial to the defendant's right to due process as the defendant's defense was that the shooting was accidental and the instruction essentially removed the requirement of premeditation as an element of the crime.

D. Trial counsel failed to object to the jury instruction given by the court on malice aforethought.

The jury was given the following instruction on "malice aforethought":

> Express Malice is that deliberate intention unlawfully to take away the life of a fellow

creature, which is manifested by external circumstances capable of proof.

Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned or malignant heart.

The giving of this instruction deprived Mr. Slack of his constitutional rights by creating a reasonable likelihood that the State would be relieved of its burden to prove each element of the offense beyond a reasonable doubt. Such an instruction subverted the presumption of innocence afforded to accused persons and also invaded the truth-finding task of the jury.

The primary failing of the "implied malice" instruction is that it created a mandatory presumption that malice shall be implied both in the absence of provocation and when the circumstances of the killing show "abandoned or malignant heart". This explicit and unqualified command directly foreclosed independent jury consideration of whether the facts established "malice aforethought" an essential element of the offenses with which Mr. Slack was charged.

The instruction also poses substantial problems with respect to the specified "basic-facts" – lack of provocation or an "abandoned and malignant heart" – from which malice shall be implied. These supposed circumstances are so cryptic and metaphysical that they are meaningless without further definition. Such language might also easily permit a jury to equate malignant heart with an evil disposition or despicable character, which could then lead the jury, especially in a close case, to find

the existence of malice aforethought because it believes the accused to be a bad person.

The giving of the unconstitutional "implied malice" instruction substantially and injuriously affected the process to such an extent as to render Mr. Slack's conviction and sentence fundamentally unfair. The State cannot show, beyond a reasonable doubt that this instruction did not affect the conviction.

Trial counsel failed to interpose any objection to the unconstitutional instruction on malice aforethought or to offer an alternative, constitutional instruction thus depriving him of his Sixth and Fourteenth Amendment right to effective assistance of counsel. Trial counsel could have had no tactical or strategic reason for failing to require the jury to be properly instructed on malice aforethought. The failing as to this instruction deprived the defendant of his right to present a defense.

E. Trial Counsel failed to investigate the facts of the case and develop available defenses

Trial Counsel did not conduct even the semblance of an investigation. He failed to investigate and develop the defense of accident. Trial counsel did not obtain expert assistance or utilize expert witnesses. Expert testimony should have been presented to disprove the testimony of the state's single expert witness, Sheldon Green, MD. Had Mr. Gardener utilized the testimony of an independent expert, it is likely he would have refuted Dr. Green's opinion that the decedent's death was inconsistent with a "self-inflicted accidental" shooting. An expert witness could have explained to the jury how the

death was consistent with an accidental (not self-inflicted) injury.

Further, defense counsel failed to obtain expert assistance regarding he portion of the weapon seized by North Las Vegas police department officials. Had trial counsel consulted with an expert and submitted the portion of the weapon for independent testing, it is likely that the results would have been consistent with the presentation of the defense of accident.

20. **Ground Six:**

Petitioner was denied the effective assistance of appellate counsel in violation of the Sixth Amendment

A. Appellate counsel failed to raise the following issues on direct appeal:

1. Petitioner was Denied His Right to Due Process Under the Fifth and Fourteenth Amendment because he was charged with "open murder" in an information which did not properly plead each element of first degree murder thus failing to impart sufficient notice to him.

2. The malice aforethought instruction was unconstitutional.

B. Appellate counsel conceded two of the four issues raised depriving petitioner of any effective review on direct appeal of the conviction.

Deputy Public Defender, R. Michael Gardner was appointed to represent petitioner on his direct appeal. Mr. Gardner prepared the appellate brief on petitioner's behalf. However, Steve Dahl, another employee of the

Clark County Public Defender's Office gave the oral argument on petitioner's behalf. Mr. Dahl indicated at oral argument that he did not "do the trial" nor "write this brief", and he would not be presenting argument on three of the four issues raised in petitioner's brief. Furthermore, he went one step beyond simply not arguing and left the Nevada Supreme Court with the impression that he conceded two of the issues raised by indicating: 1) that Issue One alleged that insufficient evidence was adduced at trial to support a conviction for second degree murder was "not worth arguing;" and 2) that Issue Four challenging the premeditation and deliberation instruction "did not fit into the facts of this case" Transcript of Appellate Argument page one, Petitioner's Exhibit two.

Petitioner's appellate counsel at oral argument did not have a tactical or strategic reason for giving the Nevada Supreme Court the impression that he was conceding issues One and Four. Counsel's carelessness in doing so deprived petitioner of his right to effective appellate counsel.

21. **Ground Seven:The doctrine of cumulative error mandates relief**

The combination of the failure of advocacy on the part of trial and appellate counsel, judicial abuse of discretion, constitutional error and all other issues raised in this petition when reviewed in light of this record, constitutes cumulative error warranting relief.

22. **REQUEST FOR RELIEF**

WHEREFORE, Petitioner prays this court to enter an order granting the Writ of Habeas Corpus:

1. Issue a Writ of Habeas Corpus to have petitioner brought before the court, so that he might be discharged from his unconstitutional confinement and restraint;

2. Conduct an evidentiary hearing in which proof may be offered concerning the allegations set forth in this petition and any affirmative defenses raised by Respondent.

3. Grant Petitioner the authority to obtain subpoenas for witnesses and documents necessary to prove the facts alleged in this Petition;

4. Require Respondents to bring fourth all pertinent records not previously produced so that this Court can review those parts of the record relevant to the issues raised in this Petition; and

5. Grant such further relief as the interests of justice may require.[1]

Dated this 19th day of December, 1997.

/s/ Deborah A. Trevino
Deborah A. Trevino
Assistant Federal Public Defender
Attorney for Petitioner

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[1] Due to the difficulties in mail service within the Nevada State Prison, verification by the petitioner of the Amended Petition will be provided upon its receipt.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on December 23, [pmr] 1997, she served a copy of the above and foregoing documents by placing a true and correct copy in the United States mail, postage prepaid and addressed to the persons named below:

Julie Slabaugh
Deputy Attorney General
Criminal Division
100 N. Carson Street
Carson City, NV
89701-4717

Antonio Slack
#3395
Ely State Prison
PO Box 1989
Ely, NV 89301

/s/ Pamela M. Ramage
Pamela M. Ramage
Legal Assistant

FRANKIE SUE DEL PAPA
Attorney General
JULIE A. SLABAUGH
Deputy Attorney General
Criminal Justice Division
100 North Carson Street
Carson City, Nevada 89701-4717
Telephone: (702) 687-3529

Attorneys for Respondents.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

ANTONIO A. SLACK, Petitioner, vs. E. K. MC DANIEL, Warden, et. al., Respondents.	Case No. CV-N-95-194-DWH **MOTION TO DISMISS SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. 2254 BY A PERSON IN STATE CUSTODY**

COMES NOW, Respondents by and through counsel, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, and hereby moves this honorable Court for an order dismissing Petitioner's "Second Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254 by a Person in State Custody."[1] This motion is made and

[1] Petitioner has actually filed a third amended petition which he has erroneously titled his second amended petition. Throughout the rest of this motion Respondents will refer to Petitioner's third amended petition to avoid any confusion in the future.

based on the points and authorities attached hereto as well as all of the documents and pleadings on file herein.

POINTS AND AUTHORITIES

I.

PROCEDURAL HISTORY

On December 29, 1989, an information was filed in the Eighth Judicial District Court of the State of Nevada in and for Clark County charging Petitioner ANTONIO SLACK (hereinafter SLACK) with Murder With the Use of a Deadly Weapon. (Exhibit 3.)[2] On February 22, 1990, SLACK was convicted, pursuant to a jury verdict, of Second Degree Murder With the Use of a Deadly Weapon. (Exhibit 12.) On May 23, 1990, a judgment of conviction was filed stating that SLACK was sentenced to a term of life with the possibility of parole for Second Degree Murder and a consecutive term of life with the possibility of parole for the use of a deadly weapon. (Exhibit 13.)

SLACK appealed his conviction to the Nevada Supreme Court and on February 4, 1991, he filed his opening brief. (Exhibit 20.) In his brief SLACK claimed there was insufficient evidence adduced at his trial to convict him; that the trial court improperly allowed evidence of a sexual relationship between SLACK and the twelve-year-old victim, based on state law; that the reasonable doubt jury instruction given at his trial violated the due process clause of the United States and Nevada

[2] All references to exhibits are to the exhibits filed herein on September 15, 1995, unless otherwise noted.

constitutions; and that the trial court erred by not adequately defining premeditation in the jury instructions, based on state law. *Id.*

On November 5, 1991, the Nevada Supreme Court filed its order dismissing SLACK's appeal. (Exhibit 22.) The Nevada Supreme Court concluded that the prosecution's reference to the intimate relationship of SLACK and the victim was properly admitted as evidence of SLACK's credibility after he denied having a boyfriend/girlfriend relationship with the victim. *Id.* At oral argument, SLACK's counsel conceded that the other issues raised in the brief were without merit. *Id.*

On November 27, 1991, SLACK filed a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254 by a person in State Custody in the United States District Court for the District of Nevada. (Exhibit 25.) In his first federal petition SLACK raised the following issues: insufficient evidence was adduced at trial to convict him of Second Degree Murder; the trial court improperly allowed prejudicial evidence of a sexual relationship between SLACK and the twelve-year-old victim; the reasonable doubt instruction violated the due process clause of the United States and Nevada constitutions; and the trial court erred in not adequately defining premeditation in jury instructions regarding murder. *Id.* On February 19, 1992, SLACK's first federal petition was dismissed without prejudice so that he could exhaust his state remedies. (Exhibit 27.)

On July 10, 1992, SLACK filed a petition for writ of habeas corpus (post-conviction) in the Eighth Judicial District Court of the State of Nevada in and for the

County of Clark. In his petition SLACK claimed as ground 1 that he was denied the effective assistant [sic] of counsel at pre-trial and trial in that his counsel: 1) failed to find out what kind of deal was made with Kamal Bey; 2) failed to file a pre-trial motion in limine to stop the introduction of prior sexual relations with the victim; 3) failed to file a pre-trial motion in limine to stop the testimony of Kamal Bey, as his deal was based on his trial testimony; 4) failed to interview SLACK's brother to refute the testimony of Kamal Bey; 5) failed to ask Kamal Bey what deals he made with the state for his testimony; 6) failed to request an accomplice instruction; 7) failed to have it presented to the jury that the only fingerprints found on the murder weapon were those of Kamal Bey, SLACK's co-defendant; and 8) these alleged errors prejudiced him. *Id.*

As ground two, SLACK claimed that he had ineffective assistance of counsel on his direct appeal in that his appellate counsel: 1) failed to raise a Franklin violation on appeal; 2) failed to raise the issue that counsel failed to request an accomplice instruction; 3) failed to raise the issue that Kamal Bey was a co-defendant and his testimony was questionable; and 4) failed to raise the issue there was prosecutorial misconduct when the prosecutor failed to inform the jury that Kamal Bey was a co-defendant as well as the fact that Bey's fingerprints were the only fingerprints found on the murder weapon. *Id.*

As ground three, SLACK claimed that the trial court deprived him of his rights under the Sixth and Fourteenth Amendments to a fair and impartial trial when the court failed to properly instruct the jury on accomplice testimony and the trial court improperly instructed the

jury on premeditation. *Id*. As ground four, SLACK claimed that the prosecutor committed misconduct by withholding from the jury that the only fingerprints found on the murder weapon were those of Kamal Bey and that he was a co-defendant in the case. *Id*.

On February 11, 1993, the state district court denied SLACK's petition for post-conviction relief. (Exhibit 37.) SLACK appealed and on December 30, 1993, the Nevada Supreme Court dismissed his appeal (Exhibit 39.) The Nevada Supreme Court found that SLACK's claims were repelled by the record. Specifically the Nevada Supreme Court found the terms of the state's agreement with Bey were fully disclosed to the jury. The Court found that SLACK's theory of the case was that he accidentally shot the victim and noted that SLACK testified that his finger was on the trigger when the gun fired. Therefore it was irrelevant that Bey's fingerprints were found on the weapon. The Nevada Supreme Court also found that Bey was neither an accomplice nor a co-defendant and SLACK was not prejudiced by the lack of an accomplice testimony instruction. The Court also noted that the remaining claims were similarly repelled by the record. *Id*.

On May 30, 1995, SLACK filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 with this Court. On September 15, 1995, Respondents filed a motion to dismiss SLACK's petition. On August 13, 1996, this Court granted Respondents motion to dismiss to the extent that SLACK had thirty (30) days to file an amended petition. On October 8, 1996 SLACK filed his First Amended Petition for Writ of Habeas Corpus. On

February 14, 1997, this Court appointed the Federal Public Defender's office to represent SLACK. On June 13, 1997, Respondents received SLACK's second amended petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. In his second amended petition SLACK alleged the following grounds: 1) Insufficient evidence was adduced at trial to support a conviction for the crime of second degree murder in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States constitution; 2) SLACK was denied his right to due process under the Fifth, Sixth, and Fourteenth Amendments because he was charged with "open murder" in an information which did not properly plead each element of first degree murder to impart sufficient notice to him; 3) the trial court improperly allowed other crimes, bad act evidence in violation of the Fifth, Sixth and Fourteenth Amendments to the United States constitution; 4) SLACK was denied the effective assistance of trial counsel in violation of the Sixth, Eighth and Fourteenth Amendments to the United States constitution; 5) the trial court failed to properly instruct the jury, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States constitution, on reasonable doubt, premeditation and malice aforethought; 6) SLACK was denied the effective assistance of appellate counsel in violation of the Sixth Amendment; and 7) the doctrine of cumulative error mandates relief.

On July 3, 1997, Respondents filed a Motion for More Definite Statement which was granted by this Court on December 3, 1997. On December 29, 1997, Respondents received SLACK's Third Amended Petition. In his Third Amended Petition SLACK sets forth the following

grounds for relief: 1) Insufficient evidence was adduced at trial to support a conviction for the crime of second degree murder in violation of the Fifth and Fourteenth Amendments to the United States Constitution; 2) Petitioner was denied his right to due process under the Fifth and Fourteenth Amendments because he was charged with "open murder" in an information which did not properly plead each element of first degree murder thus failing to impart sufficient notice to him, 3) The defendant's right to a fair trial was destroyed by the introduction of evidence of sexual misconduct designed to prejudice the jury in violation of the Fifth and Fourteenth Amendments to the United States Constitution; 4) The trial court failed to properly instruct the jury in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution; 5) Petitioner was denied the effective assistance of trial counsel in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution; 6) Petitioner was denied the effective assistance of appellate counsel in violation of the Sixth Amendment; 7) The doctrine of cumulative error mandates relief.

Respondents now submit their motion to dismiss SLACK's third amended petition. Should this Court deny this motion Respondents reserve the right to answer or otherwise respond to SLACK's third amended petition.

II. ARGUMENT

A. SLACK'S THIRD AMENDED PETITION CONTAINS UNEXHAUSTED GROUNDS AND SHOULD BE DISMISSED.

A federal court should not entertain a petition for habeas corpus relief unless the petitioner has exhausted available and adequate state court remedies with respect to each of the claims contained in the petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982); *Lindquist v. Gardner*, 770 F.2d 876, 877 (9th Cir. 1985); *Szeto v. Rushen*, 709 F.2d 1340, 1341 (9th Cir. 1983); *Gutierrez v. Griggs*, 695 F.2d 1195, 1197 (9th Cir. 1983). In this regard, state court remedies have not been exhausted until the petitioner unsuccessfully presents his constitutional claims to the highest available state court through direct appeal or state collateral review proceedings. *See Preiser v. Rodriguez*, 411 U.S. 475, 490-94 (1973); *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981).

The exhaustion doctrine is satisfied "if a petitioner presents his claim to the highest state court and that court disposes of the claim on the merits. . . . " *Hayes v. Kincheloe*, 784 F.2d 1434, 1437 (9th Cir. 1986). The exhaustion requirement is also satisfied if a federal habeas petitioner demonstrates at the time he files his federal petition that "no state remedies are still available to the petitioner and the petitioner had not deliberately bypassed the state remedies." *Bronson v. Swinney*, 648 F. Supp. 1094, 1101 (D.Nev. 1986), *quoting Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982), *cert. denied*, 463 U.S. 1212 (1983).

Federal statutory law provides in relevant part that:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. . . . An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. 28 U.S.C. § 2254(b) & (c).

This exhaustion requirement is a matter of comity designed to afford state courts the first opportunity to remedy a constitutional violation. *Sweet v. Cupp*, 640 F.2d 233, 236 (9th Cir. 1981). Even a petition containing both exhausted and unexhausted claims must be dismissed "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition so as to present only exhausted claims to the district court." *Rose v. Lundy*, 455 U.S. at 510. Both the federal district court and court of appeals may examine the issue of exhaustion *sua sponte*. *Batchelor v. Cupp*, 693 F.2d at 862, *citing Campbell v. Crist*, 647 F.2d 956, 957 (9th Cir. 1981).

The United States Supreme Court has held that, in order for a federal claim to be exhausted, the state courts must be alerted to the fact that the state prisoner is

raising claims under the United States Constitution. *Duncan v. Henry*, 115 S.Ct. 887 (1995). The Ninth Circuit Court of Appeals has stated that a claim is "fairly presented" if the petitioner has described the operative facts and legal theory upon which his claim is based. *Picard v. Connor*, 404 U.S. 270, 277-78 (1971). *See also Pappageorge v. Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982), *cert. denied*, 459 U.S. 1219 (1983).

Further, the United [sic] Supreme Court has held that raising a claim for the first and only time in a procedural context in which its merits will not be considered, absence special circumstances, does not constitute fair presentation for exhaustion purposes. *Castille v. Peoples*, 489 U.S. 346, 350, 109 S.Ct. 1056, 1060 (1989); *See also, Roettgen v. Copeland*, 33 F.3d 36 (9th Cir. 1994). (Claim was unexhausted when presented to State's highest court in a procedural context in which its merits will not be considered absent special circumstances).

Additionally, the United States Supreme Court has adopted the principle of complete exhaustion and determined that mixed petitions, those petitions containing both exhausted and unexhausted claims, must be dismissed. *Rose v. Lundy*, 455 U.S. 509, 522 (1982).

In this case, grounds two (2) and four (4)(c) were not raised in state court by SLACK's own admission. (Third Amended Petition, pgs. 5 & 9.) Ground three (3) was raised in SLACK's direct appeal, however it was not raised as a violation of the United States Constitution. SLACK's argument in his direct appeal was based solely on state evidentiary law, specifically NRS 48.035 and NRS 48.045. (Exhibit 20, pgs. 15-18.)

In *Duncan v. Henry*, supra, the prisoner, in state court, challenged evidence admitted in his trial on the basis of the California evidence code. In his federal post-conviction petition, the prisoner claimed that the evidentiary error amounted to a denial of due process in violation of the United States Constitution. The Supreme Court held:

> If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan v. Henry, 115 S.Ct. 887, 888 (1995).

Since SLACK did not allege, on direct appeal, that the introduction of evidence of sexual misconduct violated his rights under the Fifth and Fourteenth Amendments his allegation in ground three (3) is unexhausted.

In ground five (5), SLACK raises five (5) allegations of ineffective assistance of trial counsel. Only one of SLACK's allegations is exhausted. Ground five, subsections (B) through (E) have never been raised in state court. (*See* Exhibits 20 & 31.) Therefore, the majority of ground five (5) is unexhausted.

In addition, in ground six (6) SLACK raises two allegations of ineffective assistance of appellate counsel. However, neither of SLACK's allegations have been presented to the Nevada courts. (*See* Exhibits 20 & 31.) Therefore, ground six (6) is unexhausted in its entirety.

Finally, ground seven (7) has not been presented to any Nevada court. *Id*. SLACK's third amended petition contains unexhausted grounds. Therefore, it should be dismissed as a mixed petition.

B. THE INSTANT PETITION CONSTITUTES AN ABUSE OF THE WRIT UNDER RULE 9(b).

SLACK has previously litigated a Petition for Writ of Habeas Corpus Pursuant [sic] 28 U.S.C. § 2254 in this Court. (*See* Exhibit 25.) In Case Number CV-N-91-561-HDM, in the United States District Court for the District of Nevada, SLACK raised the following grounds for relief: 1) Insufficient evidence was adduced at trial to convict the Defendant with (sic) second degree murder with use of a deadly weapon; 2) The trial court improperly allowed prejudicial evidence of a sexual relationship between the defendant and the twelve year old victim; 3) The reasonable doubt instruction to jury by trial court violated due process clause of the U.S. and State Constitution (Cage v. Louisiana); 4) Trial court erred by not adequately defining premeditation in jury instructions regarding murder. *Id*.

SLACK subsequently moved to stay Case Number CV-N-91-561-HDM in order to return to state court and exhaust the following claims: 1) Ineffective assistance of counsel during all pretrial and trial proceedings as follows: a) failure to raise a Franklin violation, in that the deal made with petitioner's co-defendant was not completed before his testimony was allowed; and b) that counsel failed to offer and/or request an accomplice and/or informant instruction; 2) That the trial court erred in

not instructing the jury on an accomplice instruction and his testimony; 3) That the trial court erred in allowing the co-defendant to testify prior to the deal being made with him and the state being completed; 4) That there was prosecutorial misconduct, in that the prosecution withheld from the jury the fact that the only fingerprints found on the murder weapon were those of the co-defendants. (Exhibit 26.)

On February 19, 1992, SLACK's federal petition in Case Number CV-N-91-561-HDM was dismissed without prejudice. (Exhibit 27.) SLACK was granted leave to file an application to renew upon exhaustion of all state remedies. *Id.*

In his instant petition SLACK has raised the following issues: 1) Insufficient evidence was adduced at trial to support a conviction for the crime of second degree murder in violation of the Fifth and Fourteenth Amendments to the United States Constitution; 2) Petitioner was denied his right to due process under the Fifth and Fourteenth Amendments because he was charged with "open murder" in an information which did not pro[illegible]rly plead each element of first degree murder thus failing to impart sufficient notice to him; 3) The defendant's right to a fair trial was destroyed by the introduction of evidence of sexual misconduct designed to prejudice the jury in violation of the Fifth and Fourteenth Amendments to the United States Constitution; 4) The trial court failed to properly instruct the jury in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution because: A) the reasonable doubt instruction was unconstitutional; B) the premeditation and deliberation instruction was unconstitutional; C) and the malice aforethought

instruction was unconstitutional; 5) Petitioner was denied the effective assistance of trial counsel in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution because: A) trial counsel filed [sic] to take any action to prevent the introduction of highly prejudicial evidence of sexual contact between the defendant and the twelve (12) year old victim; B) trial counsel failed to object to the jury instruction given by the court on reasonable doubt; C) trial counsel failed to object to the jury instruction given by the court on premeditation and deliberation; D) trial counsel failed to object to the jury instruction given by the court on malice aforethought; and E) trial counsel failed to investigate the facts of the case and develop available defenses; 6) Petitioner was denied the effective assistance of appellate counsel in violation of the Sixth Amendment because; A) appellate counsel failed to raise the issues that SLACK was denied his right to due process because he was charged with "open murder" in an information which did not properly plead each element of first degree murder and that the malice aforethought instruction was unconstitutional; and B) appellate counsel conceded two of the four issues raised depriving petitioner of any effective review on direct appeal of the conviction; and 7) The doctrine of cumulative error mandates relief.

Grounds two, four (C), five, six and seven were not raised by SLACK in his previous petition. (*See* Exhibit 25.) In fact, none of these grounds were included in the claims SLACK wished to exhaust in State court. (*See* Exhibit 26.) Respondents assert that SLACK's allegations in ground two, four (C), five, six and seven constitute new and different grounds and are therefore barred under Rule

9(b), of the Rules Governing Section 2254 Cases in the United States District Court, because SLACK's failure to assert these grounds in his prior federal petition constitutes an abuse of the writ. *See Farmer v. Angelone*, 98 F.3d 1548 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1474 (1997).

The federal rules regarding habeas petitions state that a "second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." Rules Governing Section 2254 Cases, Rule 9(b), 28 U.S.C. foll. § 2254. Thus, the rule covers those situations in which a claim previously addressed is again raised and those situations in which new claims are raised which were not raised in the first petition.

The most recent and thorough case dealing with the issue of successive petitions and abuse of the writ is *McCleskey v. Zant*, 111 S.Ct. 1454 (1991). Although *McCleskey* primarily deals with the issue of good cause, the case contains a fairly thorough discussion and history on abuse of the writ. On a Rule 9(b) issue, it is the government's burden to plead abuse of the writ. *McCleskey* at 1470; *Sanders v. United States*, 373 U.S. 1, 10 (1963). A government meets its burden of pleading if it notes petitioner's prior writ history, indicates the claims appearing for the first time in a successive petition and affirms its belief that petitioner is abusing the writ in the manner prescribed by Rule 9(b). *McCleskey* at 1470. Abuse of the writ may be raised by the court *sua sponte*. *Jones v. Estelle*, 722 F.2d 159, 164 (5th Cir. 1983).

Once abuse of the writ has been alleged, petitioner has the burden of proving that he has not abused the writ. *McCleskey* at 1470; *Price v. Johnston*, 334 U.S. 266, 292 (1948). He must demonstrate "cause" and "prejudice" as those terms are understood in the context of procedural bar, for not presenting the claim in a prior petition. The "cause" element may be excused only if the failure of the federal court to address the claim would constitute a "fundamental miscarriage of justice," i.e., the claim would establish the petitioner's factual innocence. *McCleskey* at 1470-71.

"Cause" in this context means petitioner *could not* have presented the claim in a previous petition because "some objective factor external to the defense impeded counsel's efforts" to raise the claim. *McCleskey* at 1470. For cause to exist, the external impediment must have actually *prevented* petitioner from raising the claim. *McCleskey* at 1470, 1472. Once cause has been established, petitioner must show "actual prejudice" resulting from the errors of which he complains. *McCleskey* at 1470.

To establish "actual prejudice" a habeas petitioner bears the burden of showing not merely that the errors created a possibility of prejudice, but that they work to his actual and substantial disadvantage, "infecting his entire trial with errors of constitutional dimension." Such a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the petitioner was denied "fundamental fairness" at trial. *Murray v. Carrier*, 477 U.S. 478, 494 (1986); *United States v. Frady*, 456 U.S. 152, 168, 170 (1982); *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989).

Petitioner's opportunity to meet the burden of cause and prejudice *will not include an evidentiary hearing* if the district court determines as a matter of law that petitioner cannot satisfy the standard of cause and prejudice. *McCleskey* at 1470.

The doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review. To begin with, the writ strikes at finality. One of the law's very objects is the finality of its judgments. When a habeas petitioner succeeds in obtaining a new trial the "erosion of memory and dispersion of witnesses that occur with the passage of time" prejudice the government diminishing the chances of a reliable criminal adjudication. *McCleskey* at 1468. Finality has special importance in the context of the federal attack on a state conviction. Reexamination of state convictions on federal habeas frustrates both the State's sovereign power to punish offenders and their good faith attempts to honor constitutional rights. *McCleskey* at 1469. The federal system recognizes the independent power of a state to articulate societal norms with criminal laws, but the power of a State to pass law means little if the state cannot enforce them. *McCleskey* at 1469.

Federal collateral litigation places a heavy burden on scarce federal judicial resources and threatens the capacity of the system to resolve primary disputes. Habeas review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh. *McCleskey* at 1469; *Reed v. Ross*, 468 U.S. 1, 13 (1984).

Far more severe are the disruptions attached to a successive petition. Perpetual disrespect for the finality of convictions disparages the entire criminal justice system. *McCleskey* at 1469. There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility. *McCleskey* at 1469.

If first round habeas stretches resources, examination of successor petitions spreads the resources thinner still. Likewise, if comity and federalism are offended by a first round habeas, the offense increases when a State must defend its conviction in a second or subsequent federal proceeding on grounds not even raised in the first petition. *McCleskey* at 1469.

However, the above considerations give way when a meritorious constitutional claim is presented in a proper manner in a federal petition. The abuse of the writ rules provide a forum for presentation of meritorious claims and at the same time serve to vindicate the State's interest in finality of judgments. Accordingly, for a second or successive petition, the petitioner must demonstrate cause and prejudice to raise a new issue in such a petition. *McCleskey* at 1469-70.

The question to be answered in determining whether a habeas petitioner has abused the writ by failing to raise a claim in a prior habeas petition is whether the claim was withheld without legal excuse. *Harris v. Pulley*, 885 F.2d 1354, 1369 (9th Cir. 1988).

The abuse of the writ doctrine examines petitioner's conduct: the question is whether petitioner possessed, *or by reasonable means could have obtained*, a sufficient basis to

allege a claim in the first petition and pursue the matter in habeas corpus. *McCleskey* at 1472. The requirement of cause in the abuse of the writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds in a first federal habeas petition. If what petitioner knows *or could discover upon reasonable investigation* supports a claim for belief, what he does not know is irrelevant. Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim. *McCleskey* at 1472.

In *Delo v. Stokes*, 110 S.Ct. 1880 (1990) (per curiam), the United States Supreme Court vacated a stay of execution and expressly held it was an abuse of the writ for Stokes to raise a claim which "could have been raised in his first petition for federal habeas corpus." *Id.* at 329. Thus, the Supreme Court has made it clear that presentation of any claim which *could* have been presented in an earlier habeas petition constitutes an abuse of the writ.

Respondents have specifically plead [sic] abuse of the writ. The burden now falls on SLACK to demonstrate cause and prejudice as to why he did not raise his allegations in grounds two, four (C), five, six and seven in his prior petition.

III. CONCLUSION

SLACK's third amended petition contains unexhausted grounds and should be dismissed. In addition, SLACK's inclusion of new and different grounds in his

third amended petition constitutes an abuse of the writ and those claims should be barred.

DATED this 28th day of January, 1998.

FRANKIE SUE DEL PAPA
Attorney General

By: /s/ Julie A. Slabaugh
JULIE A. SLABAUGH
Deputy Attorney General
Criminal Justice Division

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 28th day of January, 1998, I served a copy of the foregoing MOTION TO DISMISS SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. 2254 BY A PERSON IN STATE CUSTODY by mailing a trues [sic] copy to the following:

DEBORAH A. TREVINO
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101

/s/ Illegible

FRANNY A. FORSMAN
Federal Public Defender
DEBORAH A. TREVINO
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330 South Third Street, #700
Las Vegas, Nevada 89101
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Attorney for Antonio Slack

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO SLACK, Petitioner, v. E.K. McDANIEL, et al., Respondents.	CV-N-95-194-DWH **OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY** (Filed Febr. 24, 1998)

COMES NOW, petitioner, Antonio Slack, through his counsel, Deborah A. Trevino, Assistant Federal Public Defender, and opposes the motion to dismiss the petition for a writ of habeas corpus filed in this case by respondent on or about December 28, 1997.

THIS OPPOSITION is based on the following points and authorities and the pleadings and papers on file herein.

DATED this 23rd day of February, 1998.

Respectfully submitted,

/s/ Deborah A. Trevino
DEBORAH A. TREVINO
Assistant Federal
Public Defender

POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS

I. INTRODUCTION

Petitioner Antonio Slack is a Nevada State prisoner serving two consecutive sentences of life with the possibility of parole pursuant to a judgment of conviction entered in 1990 in the Eighth Judicial District Court in Las Vegas, Nevada.

Mr. Slack took a timely appeal from the judgment of conviction and the Nevada Supreme Court dismissed the appeal on its merits on December 20, 1993. Thereafter, Slack pursued the state court remedies of a post conviction petition for a writ of habeas corpus (and appeal therefrom).

Slack initiated the instant litigation in proper person. Following appointment of the Federal Public Defender and the filing of an amended petition, respondent has moved to dismiss, arguing lack of exhaustion with regard to certain claims and abuse of the writ with regard to the instant petition. Slack opposes that motion.

II. ARGUMENT

A. THE CLAIMS ARE EXHAUSTED

Respondent has argued that certain of Slack's grounds for relief, or portions of those grounds, consist of claims that are not exhausted. Respondent argues each of these specific claims were not raised in their identical form in the state court and respondent accordingly concludes that Slack has not exhausted his state remedies. Moreover, respondent implies that there is an available state remedy which Slack has purposefully bypassed. As set forth below and in Slack's statement of exhaustion contained in his amended petition, Slack has fairly presented the substance of all of his claims (except Grounds Two and Four (C), to which he contends the doctrine of futility applies) to the state courts and he has, accordingly, exhausted his state remedies.

1. The legal bases for petitioner's position.

A federal court will not grant a state prisoner's petition for relief until the prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). As a general matter, state remedies have not been exhausted unless the claim has been fairly presented to the state courts and the highest state court has disposed of the claim on the merits. *Carothers v. Rhay*, 594 F.2d 225, 228 (9th Cir. 1979). Although a state prisoner seeking federal habeas relief must first exhaust the remedies available in the courts of the State. *"It is the legal issues that are to be exhausted, not the petitioner." Burkett v. Cunningham*, 826 F.2d 1208, 1218

(3d Cir. 1987) (emphasis added) (quoting *U.S. ex rel. Geisler v. Walters*, 510 F.2d 887, 893 (3d Cir. 1975)). In the instant case, Slack has raised *every claim* in state court and has pursued *every possible remedy;* respondent's arguments in each case relate to the technical specifics concerning underlying facts or legal theories.

The exhaustion requirement stems from the doctrine of comity which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." *Carter v. Estelle*, 677 F.2d 427, 441 (5th Cir. 1982), *reh'g denied* 691 F.2d 777, *cert. denied* 460 U.S. 1056, 103 S.Ct. 1508 (1983) (citing *Darr v. Burford*, 339 U.S. 200, 204, 70 S.Ct. 587, 590, 94 L.Ed. 761 (1950)). Thus, exhaustion requires only that the petitioner fairly present his federal claims to the state's highest court "either on direct review of the conviction or in a post-conviction attack" before a federal court may consider those claims. *Id.* at 443 (citations omitted).

The Court in *Castille v. Peoples*, 489 U.S. 346, 109 S.Ct. 1056, *reh'g denied* 490 U.S. 1076, 109 S.Ct. 2091 (1989) expressly made clear that, where further state proceedings are unavailable or would be useless, the exhaustion requirement is excused. *Castille*, 489 U.S. at 351; accord *Carter*, 691 F.2d at 445 ("[i]f state procedures do not provide a bona fide forum for a petitioner's constitutional claims or merely delay and hinder ultimate resolution, the foundations upon which exhaustion doctrine rests are dissolved"). "Thus, in determining whether a remedy for a particular constitutional claim is 'available,' the federal

courts are authorized, indeed required, to assess the likelihood that a state court will accord the habeas petitioner a hearing on the merits of his claim." *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 1046, 103 L.2d.2d 308 (1989) (O'Connor, J. concurring, joined by The Chief Justice, and Scalia, J.) *"The word "available"* as used in 28 U.S.C. § 2254(b) (requiring a petitioner first to exhaust available remedies in state court unless there exists an absence of corrective processes or 'circumstances rendering such processes ineffective to protect the rights of the prisoner') *does not refer to an avenue that exists on a map but is closed permanently to the kind of vehicle being driven by the defendant. It does not include a door that has been forever sealed."* *Russell v. Rolfs*, 893 F.2d 1033, 1037-38 (9th Cir. 1989) (emphasis added). Although respondents contend that Slack has not exhausted his claims, they have failed to identify the available state remedies that would permit him to do so.

Further, a habeas petitioner may *reformulate* claims already raised in state court; the test for exhaustion is whether the substance of the federal claim has been fairly presented to the state court. *Tamapua v. Shimoda*, 796 F.2d 261, 262 (9th Cir. 1986) (citing *Picard v. Connor*, 404 U.S. 270, 278 (1971)). Allegations which merely lend specificity to claims do not materially alter the claim. *See Vasquez v Hillery*, 474 U.S. 254, 260 (1986) (supplementation of record did not circumvent exhaustion requirement where evidence did not fundamentally alter legal claim already considered by state courts). *See e.g. Rust v. Hopkins*, 984 F.2d 1486, 1491 (8th Cir.), *cert. denied*, 113 S.Ct. 2950 (1993) (petitioner fairly presented claim to state court by referring to due process and citing state cases employing

constitutional analysis). Supplement[ation] and clarif[ication]" of the state court factual record do not necessarily change a claim so dramatically as to require that the state courts be given a new opportunity to hear the issues. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). Under *Vasquez* and its progeny, the petitioner may supplement and clarify the record with, inter alia, presentation of additional instances of the same alleged violation. *See e.g. Willis v. Newsome*, 771 F.2d 1445, 1449 n.5 (11th Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986) (failure to mention one alleged example of counsel's ineffective assistance); *Miller v. Estelle*, 677 F.2d 1080, 1083-84 (5th Cir. 1982) (exhaustion found because "incidents left out differed only in number, not in kind").

For purposes of assessing whether a claim has merely been *reformulated* in federal court, the controlling standard is that the petitioner exhausts the factual basis of the claim as long as he did not "fundamentally alter the legal claim already considered by the state courts" or "attempt[ ] to expedite federal review by deliberately withholding essential facts from the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). Moreover, liberal construction of pro se pleadings is appropriate. *See e.g. Picard v. Connor*, 404 U.S. 270, 278 (1971); *Miller v. Rowland*, 999 F.2d 389, 391 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1378 (1994) (pro se petitioner's state court claim that denial of work credits violated due process liberally construed as "substantial equivalent" of federal court claim of violation of contract clause); *Evans v. Court of Common Pleas*, 959 F.2d 1227, 1231-33 (3d Cir. 1992) (*cert. dismissed*, 113 S.Ct. 1071 (1993) (insufficiency of evidence claim, even if framed in state law rather than federal constitutional

terms, "necessarily implicates federal due process rights"); *Watson v. Dugger*, 945 F.2d 367, 372 (11th Cir. 1991) ("When a federal habeas petitioner presents what amounts to 'a mere variation in the same claim rather than a different legal theory,' . . . he has presented the state courts with the substance of his claims and thus has properly exhausted them.")

Assessment of exhaustion focuses on whether petitioner actually afforded the state courts the opportunity to rule on the claim and not on whether the state courts actually availed themselves of that opportunity. Thus, a claim presented will be deemed to be exhausted even if the state court did not address the claim on the merits and instead rejected it on a procedural ground. *See e.g. Sweet v. Cupp*, 640 F.2d 233, 237-238 (9th Cir. 1981). *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715, 1720 (1992) ("[T]he petitioner [must] afford the State a full and fair opportunity to address and resolve the claim on the merits."); *Manning v. Alexander*, 912 F.2d 878, 881-83 (6th Cir. 1990) (notwithstanding state courts' ruling that petitioner "improperly raised his claim under . . . [state] procedural laws," petitioner held to have complied with federal exhaustion requirement by giving state courts "a full and fair opportunity to consider the claims."); *Wallace v. Duckworth*, 778 F.2d 1215, 1223 (7th Cir. 1985) (although petitioner did not present argument to state court in procedurally correct manner, court was given opportunity to decide issues, which is all that is required to satisfy exhaustion requirement). *See also Smith v. Digmon*, 434 U.S. 332, 333-334, 98 S.Ct. 257, 258 (1978) (exhaustion requires only that the state court be given the opportunity to consider the claims that have been presented).

If the petitioner has pursued the appropriate state court remedies, the only question that remains for purposes of exhaustion is whether the petitioner presented the federal claim in a manner that adequately apprised the state courts of the claim and gave them "an opportunity to apply controlling legal principles to the facts bearing upon [the] constitutional claim." *Picard v. Connor*, 404 U.S. 270, 277 (1971). The basic rule is that petitioner must "present the substance of his claim to the state courts." *Vasquez v. Hillery*, 474 U.S. 254, 258 (1986). *See also Anderson v. Harless*, 459 U.S. 4, 6 (1982) (petitioner must 'fairly present[ ]' to the state court the 'substance' of his federal habeas corpus claim."); *Humphrey v. Cady*, 405 U.S. 504, 516 n.18 (1972) ("question . . . is whether any of petitioner's claims is so clearly distinct from the claim he has already presented to the state courts that it may fairly be said that the state courts have had no opportunity to pass on the claim.").

Further, respondent must not be allowed to extrapolate Slack's claims to the point of requiring that the federal petition be identical to the prior state petitions. *See Engle v. Isaac*, 456 U.S. 107, 123-124 n.25 (1982) ("a creative appellate judge could almost always distill an unexhausted due process claim . . . [W]e are reluctant to interpolate an unexhausted claim not directly presented by the petition. *Rose v. Lundy* does not compel such harsh treatment of habeas petitions."). Thus, although respondent has attempted to "mix" Slack's petition, *see Lacey v. Cabriel*, 732 F.2d 7, 11-12 (1st Cir.) ("district court [could not] 'mix' Lacy's petition for him"), *cert. denied*, 469 U.S.

861 (1984), the rule requiring liberal construction of prisoners' pleadings should not be applied to Slack's disadvantage.

Slack contends that the Nevada Supreme Court was *aware* of the issues Slack perceived as important and it had *jurisdiction* over them. That Slack's appellate counsel gave the appearance of conceding two of the four issues at oral argument and failed to raise other issues is merely the basis for a claim of ineffective assistance of appellate counsel. That the issues were not the subject of trial objections or were otherwise ill-preserved for appeal is merely the basis for a claim of ineffective assistance of trial counsel. As set forth in Slack's statement of exhaustion claims of ineffective assistance of counsel (trial and appellate) are obviously inappropriate for substantive redress on direct appeal.

2. Respondent's specific complaints

a. Ground Two. Ground Two, as pleaded in Slack's petition, is a denial of due process claim. It is based on the claim that the charging document did not properly plead each element of first degree murder. The information did not place petitioner on notice that the state was required to show that the alleged homicide was committed with premeditation and deliberation. Petitioner has not previously litigated Ground Two in state court. The state supreme court has in the past several years declared its refusal to address this issue, the doctrine of futility excuses any failure to raise this issue. See 28 U.S.C. § 2254 (b) (prior to April, 1996 amendment). It

can be fairly said that Nevada courts would refuse to hear this claim. The claim is then exhausted.

b. Ground Three

Ground three of the amended petition challenges the constitutionality of the use of evidence of sexual misconduct designed to prejudice the jury. Here, respondent argues that ground three is unexhausted because the claim was not presented as a violation of Slack's Fifth and Fourteenth Amendments. That Slack's right to due process is impinged by this violation of his right to a fair trial cannot come as surprise to the state. It is clear that the *analysis* employed at the appellate level inherently implicated due process and fair trial claims. The "unexhausted claims" upon which respondent relies cannot reasonably be said to have fundamentally altered the legal claim of prosecutorial misconduct or to reflect an attempt by petitioner to withhold facts or legal theory from the state courts. Petitioner's attempts to state as many specifics as possible underlying his claim of prosecutorial misconduct can hardly be said under the circumstances to have caused the claim to become unexhausted.

Moreover, the exhaustion doctrine does not require that a federal habeas corpus petitioner frame a claim in precisely the same manner in which it was set forth in the state court pleadings. *See Williams v. Holbrook*, 691 F.2d 3, 6 (1st Cir. 1982) (petitioner "not precluded from some reformulation of the claims . . . made in the state courts"). Respondent must not be allowed to extrapolate Slack's claims to the point of requiring that the federal petition be identical to the prior state petitions. *See Engle v. Isacc*,

456 U.S. 107, 123-124 n.25 (1982) ("a creative appellate judge could almost always distill an unexhausted due process claim . . . [W]e are reluctant to interpolate an unexhausted claim not directly presented by the petition. *Rose v. Lundy* does not compel such harsh treatment of habeas petitions.") Thus, although respondent has attempted to "mix" Slack's petition, *see Lacey v. Gabriel*, 732 F.2d 7, 11-12 (1st Cir.) ("district court [could not] 'mix] Lacy's petition for him."), *cert. denied*, 469 U.S. 861 (1984), the rule requiring liberal construction of prisoners' pleadings should not be applied to Slack's disadvantage.

c. Grounds Five and Six. These Grounds for relief allege ineffective assistance of trial and appellate counsel, respectively. Here, respondent alleges that the majority of ground five is unexhausted and Ground six is unexhausted in its entirety. Respondent's complaints in this regard go to additional *facts* pertaining to counsel's alleged errors and omissions. Notably, these *legal* errors underlying these alleged omissions are not alleged to be mentioned now for the first time.

It suffices that the substantial equivalent of a petitioner's federal habeas claim has been argued in the state proceedings." *Spiegel v. Sandstrom*, 637 F.2d 405, 407 (5th Cir. 1981). *Accord, e.g., Vasquez v. Hillery*, 474 U.S. at 260 ("supplemental evidence did not fundamentally alter the claim considered by the state courts"). In the instant case, Slack has been raising complaints pertaining to his claim of ineffective assistance of counsel at every possible opportunity. He raised the substance of this claim during an entire round of post-conviction proceedings. His increased specificity and specifications of prejudice are

not additional unexhausted claims. *See Vasquez v. Hillery*, ("supplement[ation] and clarif[ication]" of the state court factual record do not necessarily change a claim so dramatically as to require the state courts be given a new opportunity to hear the issues."). Under *Vasquez* and related decisions, the petitioner may supplement and clarify the record to include more sophisticated analyses and introduction of additional factual support. Slack has not "fundamentally alter[ed] the legal claim[s] already considered by the state courts"; accordingly, the claims are exhausted.

B. PETITIONER HAS NOT ABUSED THE WRIT

The amended petition does not violate Rule 9 of the rules governing § 2254 cases and does not constitute abuse of the writ. In *Farmer v. Angelone*, 98 F.3d 1548 (9th Cir 1996), the Ninth Circuit held that Rule 9(b) recognizes two types of abuse of the writ. One type of abuse occurs when a new petition – raising either new claims or claims previously raised – is filed after a previous petition has been addressed on the merits. This type of abuse may conveniently be termed *McCleskey* abuse: the Supreme Court, in *McCleskey v. Zant*, 499 U.S. 467 (1991), imposed the rule that a prima facie case of abuse of the writ was established as a matter of law when a new petition was filed after a previous petition had been adjudicated on the merits, and that, when those facts were pleaded, the burden shifted to the petitioner to establish an exception – cause and prejudice or a miscarriage of justice – to the abuse doctrine. *Id.* at 477.

The Supreme Court relied upon the costs associated with a second reexamination of the validity of a state conviction by a federal court, after a claim has been "defaulted in the first round of federal habeas," *McCleskey*, 499 U.S. at 490-492, 498, in imposing the stringent rules that actual knowledge of a claim at the time of the first petition is not necessary to a finding of default, when there has been a prior proceeding on the merits.

The second type of abuse may arise under the circumstances suggested by *Sanders v. United States* (upon which Rule 9(b) is based), and by former 28 U.S.C. § 2244(b). This type of abuse requires a showing that a new claim in a petition was "deliberately withheld" from a previous petition, former 28 U.S.C. § 2244(b); *Sanders*, 373 U.S. at 18, or that the petitioner "deliberately abandon[ed]" the claim in a hearing on a previous petition, *id.*, citing *Wong Doo v. United States*, 265 U.S. 239, 241 (1924); or that the "only purpose" of the petition is "to vex, harass or delay," *Sanders*, 373 U.S. at 18; or that the petitioner is deliberately engaging in needless piecemeal litigation. *Sanders*, 373 U.S. at 18.

The *Farmer* decision explicitly acknowledged the continuing validity of these standards for non-*McCleskey* abuse:

> "A federal court need not consider habeas claims previously unlitigated in federal court if it determines that the petitioner (1) made a conscious decision deliberately to withhold them from a prior petition, (2) is pursuing needless piecemeal litigation, or (3) has raised the claims only to vex, harass, or delay. Where there is no affirmative indication in the record that the petitioner made a conscious decision deliberately to withhold his claim, proceed by piecemeal litigation, to vex or harass or annoy the court or the state, a second petition raising a new claim is not an abuse of the writ.
>
> The state has presented no evidence that any of the factors outlined in *Sanders* are present. Moreover, there is nothing in the history of this case to indicate that Hamilton deliberately withheld his claim in the hope of being granted two hearings instead of one."

Farmer, 98 F.3d at 1559, *quoting Hamilton v. Vasquez*, 882 F.2d 1469, 1473 (9th Cir. 1989) (citations omitted).

This analysis of *Sanders* abuse is the only one that fits into the text and structure of the applicable statutes and rules. The *Farmer* decision emphasized the language of Rule 9(b) in concluding that abuse of the writ could be found, even if no prior proceeding on the merits of a previous petition had been conducted, relying on the language "[a] second or successive petition may be dismissed . . . if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." *Farmer*, 98 F.3d at 1555. The Advisory Committee Notes (1976) to Rule 9(b), quoted in *Farmer*, explicitly adopt the *Sanders* analysis on the standard of abuse under this theory:

> With reference to a successive application asserting a new ground or one not previously decided on the merits, the court in *Sanders* noted:

> In either case, full consideration of the merits of the new application can be avoided [only] if there has been an abuse of the writ * * * and this the Government has the burden of pleading. * * *
>
> Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, * * * he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.
>
> 373 U.S. at 17-18 [83 S.Ct. at 1078]

Farmer, 98 F.3d at 1555-1556. The Notes conclude that Rule 9(b) will not "eliminate a remedy to which the petitioner is rightfully entitled," and emphasize the language of *Sanders* holding that:

> Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.
>
> 373 U.S. at 19 [83 S.Ct. at 1078].

Farmer, 98 F.3d at 1556.

Thus the non-*McCleskey* prong of Rule 9(b) incorporates the *Sanders* standards of abuse, as the Advisory Committee Notes clearly indicate. This conclusion is also the only one consistent with the settled principle of statutory construction that an enactment which employees a term of art (like "abuse of the writ") has been judicially defined is presumed to have incorporated the judicial interpretation of the term. *E.g., McDermott Intern., Inc. v. Wilander*, 498 U.S. 337, 342 (1991); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 813 (1989).

Abuse of the writ is a defense which must be pleaded and proved by the state. *McCleskey*, 499 U.S. at 477; *United States v. Kleinbart*, 27 F.3d 586, 593 n.5 (D.C. Cir.), *cert. denied* 115 S.Ct. 456 (1994); *see, Farmer*, 98 F.3d at 1559. As with any other affirmative defense, the facts establishing the defense must be pleaded with specificity. Fed. R. Civ. P., Rules 8(b, c), 8(e)(I), 12(b); *see, e.g., Heller Financial, Inc. v. Midwhey Power Co., Inc.*, 883 F.2d 1286, 1294-1295 (7th Cir. 1989) (rules of pleading require " 'short and plain statement' of the defense [citation]," and "bare bones conclusory allegations" of legal conclusions insufficient).

In the case of *McCleskey* abuse, the requirement of specifically pleading the facts supporting the defense is simply met: all the state needs to allege is the petitioner's "writ history," *McCleskey*, 499 U.S. at 494; and if there has been an adjudication on the merits of a previous petition, the current petition (whether it raises the same claims or new claims) is abusive as a matter of law and the burden shifts to the petitioner to allege that the abuse is excused.

Non-*McCleskey* abuse, however, presents quite a different pleading situation. Unlike *McCleskey* abuse, there can be no easy recitation of a prior adjudication on the merits to establish abuse as a matter of law. Rather, the substantive standard of *Sanders* abuse requires a showing that the petitioner deliberately withheld a claim in previous litigation, or that the petitioner is engaging in a pattern of needless piecemeal litigation, or is filing the petition solely to "vex, harass, or delay" the opposing

party. *See Hamilton v. Vasquez, supra,* 882 F.2d at 1473. This pleading burden is not onerous where actual abuse exists.

For instance, in *McCleskey* itself, the petitioner had raised a claim in state collateral proceedings, thus clearly indicating the fact that the claim was known to the petitioner. In his first federal petition, petitioner did not raise that claim, but after the first petition was adjudicated he tried to raise it in a second petition. *McCleskey,* 499 U.S. at 475-476. Under the *Farmer* analysis, those facts could be alleged as showing abuse by the deliberate withholding of the claim and needless piecemeal litigation: if the claim was unexhausted when it was introduced in the new petition, and it had been deliberately withheld in a first petition that was dismissed for exhaustion in order to induce a second round of exhaustion, an inference could arise that abuse was shown. *See also Wong Doo v. United States,* 265 U.S. at 240-241 (claim raised but not litigated in first federal petition raised in second federal petition); *cf. Price v. Johnson,* 334 U.S. 266, 291-292 (1948) (no abuse where petitioner ignorant of facts supporting claim or unaware of legal significance of relevant facts). Similarly, if the only unexhausted claims included in a petition are patently frivolous, the state could allege that an inference should arise that the purpose of including the unexhausted claims in the petition was solely to "mix" the petition and to induce the necessity of exhaustion proceedings. Thus the state could properly allege that the sole purpose of asserting the claims was "to vex or harass or annoy the court or the state," *Farmer,* 98 F.3d at 1559, *quoting Hamilton v. Vasquez,* 882 F.2d at 1473, and thus that abusive conduct was shown.

By contrast, pleading simply the fact that a habeas corpus petition contains a new claim which was not raised in a previous petition which was dismissed "without prejudice" and was not adjudicated on the merits does not in any way establish that the petitioner was acting with an improper purpose, by deliberately withholding the claim in the previous proceeding, nor does it otherwise suggest the existence of a subjective intent to "vex, harass, or delay." *See Hamilton v. Vasquez,* supra, 882 F.2d at 1473. To the contrary, the addition of new claims as the result of the current federal proceedings will normally occur because that is first proceeding in which they have been recognized.

The Respondent's contention that the petitioner has abused the writ is unavailing. The respondent has incorrectly characterized the appropriate standard for abuse of the writ.

III. CONCLUSION

Slack's petition presents neither unexhausted claims nor does it constitute an abuse of the writ. Respondent's motion to dismiss should be denied and respondents should be ordered to answer the petition.

Respectfully submitted,

/s/ Deborah A. Trevino
DEBORAH A. TREVINO
Assistant Federal
Public Defender

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ANTONIO SLACK Petitioner, -vs- E.K. McDANIEL, et al., Respondents.	)	CV-N-95-194-DWH

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on February 23, 1998, she served a copy of the above and foregoing *Opposition to Motion to Dismiss Petitioner for Writ of Habeas Corpus Pursuant to U.S.C. § 2254 by a Person in State Custody,* by placing a true and correct copy into the United States mail, postage prepaid and addressed to the persons named below:

Julie Slabaugh
Deputy Attorney General
Criminal Justice Division
100 North Carson Street
Carson City, NV 89701-4717

Antonio Slack
#3395
Ely State Prison
P.O. Box 1989
Ely, NV 89301

/s/ Pamela M. Ramage

FRANKIE SUE DEL PAPA
Attorney General
JULIE A. SLABAUGH
Deputy Attorney General
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100 North Carson Street
Carson City, Nevada 89701-4717
Telephone (702) 687-3529

Attorneys for Respondents.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, vs. E. K. MC DANIEL, Warden, et. al., Respondents.	)	Case No. CV-N-95-194-DWH **REPLY TO OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY**

COMES NOW, Respondents, by and through counsel, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, and hereby replies to Petitioner's "Opposition to Motion to Dismiss Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. §2254 by a Person in State Custody." This reply is made and based on the points and authorities attached hereto as well as all of the documents and pleadings on file herein.

POINTS AND AUTHORITIES

I. ARGUMENT

A. THE INSTANT PETITION CONTAINS UNEXHAUSTED GROUNDS AND SHOULD BE DISMISSED.

In his opposition Petitioner ANTONIO SLACK (hereinafter SLACK) sets forth several arguments in support of his contention that his claims are exhausted. None of SLACK's claims have any merit.

As to his claim in ground two, that the open murder charge did not place him on notice that the state was required to prove premeditation, SLACK concedes he has never presented this claim in state court. However, SLACK argues the doctrine of futility applies because the Nevada Supreme Court has, in the past several years, declared its refusal to address this issue. First of all SLACK does not point to any authority which supports his conclusory allegation that the Nevada Supreme Court has refused to address this issue. Respondents are unaware of any such "declaration" by the Nevada Supreme Court. Respondents submit that the fact that SLACK does not cite any Nevada case in which such a "declaration" is made supports their position that the Nevada Supreme Court has never declared its refusal to address this issue.

Further, the futility doctrine has been discredited. Under the futility doctrine the exhaustion requirement was excused when a state's highest court has "recently addressed the issue raised in the petition and had resolved it adversely to the petitioner." *Sweet v. Cupp*, 640

F.2d 233, 236 (9th Cir. 1981). However, the futility doctrine was short lived.

The United States Supreme Court has criticized futility as excusing the exhaustion requirement. The Supreme Court has stated:

> If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.

Engle v. Isaac, 456 U.S. 107, 130, 102 S.Ct. 1558, 1573, 71 L.Ed.2d 783, 802 (1982).

Since *Engle*, the Ninth Circuit, while not expressly overruling *Sweet*, has rejected the futility doctrine in at least one case. *See Roberts v. Arave*, 847 F.2d 528, 530 (9th Cir. 1988). As SLACK himself has conceded he has never even attempted to present his claim in ground two to the Nevada Supreme Court. Ground two, of the instant petition is unexhausted.

As to ground three, SLACK contends that "the analysis employed at the appellate level inherently implicated due process and fair trial claims. The "unexhausted claims" upon which respondent relies cannot reasonably be said to have fundamentally altered the legal claim of prosecutorial misconduct or to reflect an attempt by petitioner to withhold facts or legal theory from the state

courts." (Opposition, pg. 11.) What legal claim of prosecutorial misconduct? SLACK has not raised a claim of prosecutorial misconduct in his third amended petition.

SLACK is attempting to argue the "essentially the same" standard as set forth in *Tamapua v. Shimoda*, 796 F.2d 261 (9th Cir. 1986). However, *Tamapua* is no longer viable in light of *Duncan*. *Keating v. Hood*, 133 F.3d 1240, 1241 (9th Cir. 1998) ("We have repudiated *Tamapua* on the basis of *Duncan*.") SLACK has not presented his federal constitutional claims set forth in ground three to the Nevada courts. Ground three is unexhausted.

As for his claims in grounds five and six, SLACK argues that Respondents argument goes only to additional facts pertaining to his counsel's errors rather than the legal claim of ineffective assistance of trial and appellate counsel. SLACK's argument totally ignores the fact that exhaustion requires that the same facts *and* legal theories be presented in state court. *See Picard v. Connor*, 404 U.S. 270, 277-78 (1971). SLACK's factual allegations in ground five, subsections (B) through (E) and in ground six have never been presented to the Nevada courts. These claims are unexhausted. SLACK's third amended petition contains unexhausted claims and should be dismissed.

B. SLACK'S THIRD AMENDED PETITION CONSTITUTES AN ABUSE OF THE WRIT.

In his opposition, SLACK argues that Rule 9(b) of the Rules Governing Section 2254 Cases recognizes two types of abuse of the writ. According to SLACK, abuse occurs when a petitioner files a new petition, following the adjudication of a former petition on the merits, which

does not raise new claims. SLACK has elected to refer to this type of abuse as *McCleskey* abuse. The second type of abuse under 9(b), according to SLACK, requires a showing that a new claim was deliberately withheld from a previous petition, or that the petitioner deliberately abandoned his claim, or that the only purpose of the petition is to vex, harass, or delay, or that the petitioner is deliberately engaging in needless, piecemeal litigation. (Opposition, pg. 14.)

According to SLACK his two types of abuse have two different standards. According to Slack, with the so called *McCleskey* abuse, the burden is on the petitioner to show cause and prejudice to overcome the abuse. SLACK then alleges that with the second type of abuse, the type alleged in this case, the burden is on the Respondents to prove that he deliberately withheld a claim in previous litigation, or that the petitioner is engaging in a pattern of needless piecemeal litigation, or is filing the petition solely to vex, harass or delay the opposing party. SLACK is simply wrong.

Abuse of the writ occurs when there is a successive petition which does not raise new claims and the former petition was adjudicated on the merits or when the successive petition does raise new claims and the failure of the petitioner to raise those claims previously constitutes abuse. Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Court foll. 28 U.S.C. §2254; *See also Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1474 (1997).

There are several ways in which a petitioner can abuse the writ. However, there is only one standard

which can excuse abuse of the writ, no matter what conduct by the petitioner is at issue. In *McCleskey v. Zant*, 111 S.Ct. 1454 (1991), the United States Supreme Court defined the abuse of the writ doctrine as follows:

> The prohibition against adjudication in federal habeas corpus of claims defaulted in state court is similar in purpose and design to the abuse-of-the-writ doctrine, which in general prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding. The terms "abuse of the writ" and "inexcusable neglect," on the one hand, and "procedural default," on the other, imply a background norm of procedural regularity binding on the petitioner. This explains the presumption against habeas adjudication both of claims defaulted in state court and of claims defaulted in the first round of federal habeas. A federal habeas court's power to excuse these types of defaulted claims derives from the court's equitable discretion. . . . In habeas, equity recognizes that a "suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." . . . For these reasons, both the abuse-of-the-writ doctrine and our procedural default jurisprudence concentrate on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time.

Id. at 1468 (citations omitted).

The Supreme Court went on to say:

> The cause and prejudice analysis we have adopted for cases of procedural default applies to an abuse-of-the-writ inquiry in the following manner. When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ. *The burden to disprove abuse then becomes petitioner's.* To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions. (emphasis added.)

Id. at 1470.

SLACK argues that his second type of abuse arises under *Sanders v. United States*, 83 S.Ct. 1068 (1963). However, *Sanders* did not create a separate type of abuse, it merely gave an example of conduct constituting abuse. The Supreme Court in *McCleskey* discussed *Sanders* stating:

> Although our decisions on the subject do not all admit of ready synthesis, one point emerges with clarity: Abuse of the writ is not confined to instances of deliberate abandonment. *Sanders* mentioned deliberate abandonment as but one example of conduct that disentitled a petitioner to relief.

McCleskey at 1467.

Sanders did not create a separate type of abuse of the writ, it simply discussed one example of a petitioner's conduct which would constitute abuse of the writ. There is only one standard which can excuse an abuse of the writ. Respondents have the burden of pleading abuse of

the writ. This is accomplished by noting SLACK's prior writ history, identifying the claims he has raised for the first time and alleging that he has abused the writ. *McCleskey* at 1470. Respondents have done so in their motion to dismiss. The burden to disprove abuse has now shifted to SLACK. *McCleskey*, at 1470. See also *Farmer*, supra.

SLACK must demonstrate cause and prejudice for failing to raise grounds two, four (C), five, six and seven in his prior federal petition. SLACK has not even attempted to demonstrate cause and prejudice in his response to Respondents' motion to dismiss. SLACK's third amended petition constitutes an abuse of the writ and should be denied.

II.

CONCLUSION

Based on the foregoing, Respondents respectfully request this Court issue an order dismissing SLACK's third amended petition.

RESPECTFULLY SUBMITTED this 6th day of March, 1998.

FRANKIE SUE DEL PAPA
Attorney General

By: /s/ Julie A. Slabaugh
JULIE A. SLABAUGH
Deputy Attorney General
Criminal Justice Division

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 6th day of March, 1998, I served a copy of the foregoing REPLY TO OPPOSITION TO MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2254 BY A PERSON IN STATE CUSTODY by mailing a true copy to the following:

DEBORAH A. TREVINO
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101

/s/ Illegible

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO T. SLACK, Petitioner, vs. E.K. McDANIEL, *et al.*, Respondents.	)	Case No. CV-N-95-194-DWH MEMORANDUM DECISION AND ORDER

Petitioner Antonio T. Slack has submitted a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 attacking the validity of his conviction. Slack asserts seven grounds for relief: (1) insufficient evidence was adduced at trial to support his conviction; (2) he had insufficient notice of his charges since he was charged with "open murder" in an information which did not properly plead each element of first degree murder; (3) the jury was prejudiced by evidence of sexual misconduct; (4) the trial court failed to properly instruct the jury; (5) he was denied effective assistance of counsel; (6) he was denied effective assistance of appellate counsel; and (7) cumulative error.

Slack previously filed a petition for writ of habeas corpus, case number CV-N-91-561-HDM, in which he alleged: (1) insufficient evidence was adduced at trial to support his conviction; (2) the trial court improperly allowed prejudicial evidence of sexual misconduct; (3) the reasonable doubt jury instruction was unconstitutional; and (4) the trial court failed to adequately define the premeditation instruction. *See Slack v. Director of Nevada*

State Prisons, CV-N-91-561-HDM. In that action, Slack filed a motion to stay the proceedings so he could exhaust the following issues before continuing with his federal habeas petition: (1) ineffective assistance of counsel during pre-trial proceedings and trial because counsel failed to raise Franklin violation, and failed to request accomplice or informant instruction; (2) trial court erred in not giving an accomplice jury instruction; (3) trial court erred in allowing co-defendant to testify prior to state making a deal with him; (4) prosecutorial misconduct when prosecutor failed to instruct jury that only fingerprints on the murder weapon were from co-defendant. The court dismissed Slack's first habeas petition without prejudice, and granted him leave to file an application to renew upon exhaustion of all State remedies.

Respondents have moved to dismiss the instant petition alleging abuse of the writ (#67). Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts provides that:

> A second or successive petition may be dismissed . . . if new and different grounds are alleged [and] the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

In the instant petition, grounds two, four (C), five, six and seven were not raised in Slack's previous petition. Therefore, the issue before the court is whether Slack's failure to assert the new ground in his first petition constitutes an abuse of the writ.

In *McCleskey v. Zant*, 499 U.S. 467 (1991), the U.S. Supreme Court defined the respective burdens of pleading abuse of the writ. To meet their burden, the state must with clarity and particularity note the prior writ history, identify the claims that appear for the first time in the current petition, and allege that petitioner has abused the writ. If the state meets their burden, then petitioner must show (1) cause for not raising the claim the previous petition, e.g., that he was impeded by some objective factor external to the defense, such as governmental interference or the reasonable unavailability of the factual basis for the claim, and (2) actual prejudice resulting from the errors about which he complains. *Bonin v. Calderon*, 77 F.3d 1155, 1158-59 (9th Cir. 1996); *Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir. 1996).

"Abuse of the writ doctrine examines *petitioner's* conduct: the question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition. . . . " *McClesky*, 499 U.S. at 498. An inmate's pro se status does not constitute "an objective external factor" which excuses a petitioner's failure to raise his new claim in prior habeas petitions. *Saahir v. Collins*, 956 F.2d 115, 118 (5th Cir.1992); *Hughes v. Idaho State Board*, 800 F.2d 905, 909 (9th Cir.1986). An inmate's pro se status does not excuse an inmate's ignorance of the law nor establish cause for the purpose of determining whether an inmate abused the writ by failing to raise new claims in prior habeas petitions: there is no constitutional right to counsel in post-conviction proceedings. *Saahir*, 956 F.2d at 118. To show actual prejudice, "petitioner bears 'the burden of showing

not merely that the errors at his trial constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimension.' " *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989) (*quoting United States v. Frady*, 456 U.S. 152, 170 (1982)).

As an alternative to showing "cause and prejudice," Slack may attempt to show that dismissal of his instant claim on abuse of the writ grounds will result in a "fundamental miscarriage of justice." Such a showing, however, is very difficult to make. It requires Slack to demonstrate that he is "actually innocent" of the crime with which he was convicted. *See also Smith v. Murray*, 477 U.S. 527, 537 (1986).

Respondents have met their burden in alleging that Slack has abused the writ. Slack must now establish cause and prejudice for his failure to assert the instant claim in his first petition or he must demonstrate that a fundamental miscarriage of justice will result if the court dismisses the case for abuse of the writ. Given the extreme difficulty of showing a "fundamentally unjust incarceration," this court recommends Slack disregard this alternative test and attempt to show cause and prejudice.

IT IS ORDERED that Slack shall have fifteen (15) days from the date of this order within which to file points and authorities addressing whether he can overcome the abuse of the writ bar that is applicable to grounds two, four (C), five, six and seven of the instant amended habeas petition. No extensions of time will be granted.

Dated this 10th day of March, 1998.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

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Attorney for Slack

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO T. SLACK, Petitioner, vs. DIRECTOR, NDOP, et al., Respondents.	CV-N-95-194-DWH **MOTION FOR RECONSIDERATION OF MEMORANDUM DECISION AND ORDER ENTERED ON MARCH 11, 1998** (Filed Mar. 26, 1998)

Petitioner, Antonio Slack, by and through his counsel of record, Franny A. Forsman, Federal Public Defender, Deborah A. Trevino, Assistant Federal Defender, respectfully moves this court to reconsider, alter and amend its Memorandum Decision and Order entered March 11, 1998. This motion is made pursuant to Rule 59 of the Federal Rules of Civil Procedure and is based upon the attached memorandum of points and authorities and the entire file in this matter. Petitioner respectfully requests a hearing in this matter. Undersigned counsel anticipates approximately thirty minutes for oral argument.

DATED this 25th day of March, 1998.

Respectfully Submitted,

/s/ Deborah a. Treviño
DEBORAH A. TREVIÑO
Asst. Federal Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The court has entered an order determining that Respondents have met their burden in alleging that petitioner has abused the writ with regard to grounds two, four(C), five and seven of the instant amended petition. On the basis of this determination, the court has ordered petitioner to file points and authorities addressing whether he can overcome the abuse of the writ bar. This motion for reconsideration follows. The court's order is premised upon an error of law which requires correction and reconsideration.

A. The state has not alleged facts sufficient to establish that an abuse of the writ has occurred.

The state argues that Rule 9(b) of the Rules Governing Section 2254 cases requires that the grounds asserted in the amended petition which are unexhausted or were not included in the previous federal petitions should be dismissed under the abuse of the writ doctrine. The state's pleading does not furnish any ground for dismissing any part of the amended petition.

B. The amended petition is not a "second or successive" one under Rule 9(b).

Initially, in order to preserve the question for review, petitioner submits that Rule 9(b) does not apply to his case at all, because the amended petition before the court is not a "second or successive" one within the meaning of the rule, since the previous federal petition was dismissed without prejudice for exhaustion. Petitioner recognizes that the Court of Appeals has adopted a contrary position. *Farmer v. McDaniel,* 98 F.3d at 1556-1557. Every other Court of Appeals that has addressed this issue, however, has held that a petition is not subject to Rule 9(b) as a "second or successive" one if previous petitions have been dismissed without prejudice for exhaustion. *McWilliams v. State of Colorado,* 121 F.3d 573, 575 (10th Cir. 1997); *Benton v. Washington,* 106 F.3d 162, 164 (7th Cir. 1996); *Camarano v. Irvin,* 98 F.3d 44, 46-47 (3d Cir. 1996); *In re Gasery,* 116 F.3d 1051, 1052 (5th Cir. 1997); *Woods v. Whitley,* 933 F.2d 321, 322 (5th Cir. 1991); *Jones v. Estelle,* 722 F.2d 159, 168 (5th Cir. 1983) (en banc) *cert. denied,* 466 U.S. 976 (1984); *Dickson v. Maine,* 101 F.3d 791, 791 (1st Cir. 1996) (per curiam).

C. The A.E.D.P.A. has superseded Rule 9(b) of the Rules governing § 2254 cases.

This case is governed by the A.E.D.P.A. because it was commenced after April 25, 1996. In *Farmer* the Ninth Circuit held that Rule 9(b) applies, in limited part, to §2254 actions that had previously been dismissed without prejudice. The A.E.D.P.A. provides that a successor petition cannot be filed with the district court unless a panel

of the Court of Appeals authorizes such an action. 28 U.S.C. §2244(b)(3). In a case following the enactment of the A.E.D.P.A. the Ninth Circuit held that previous petitions which have been dismissed without prejudice on exhaustion grounds do not trigger §2244(b)(3). *In re Turner,* 101 F.3d 1323 (9th Cir. 1997). In other words, a dismissal without prejudice does not make the next §2254 action a successor petition.

The Court of Appeals for this circuit has created an intra-circuit conflict with *Farmer* by holding that a "second or successive" petition under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) – which uses the identical language in 28 U.S.C. §2244(b) that is used in, and was adopted from, Rule 9(b) – does not refer to a petition filed after a previous petition has been dismissed without prejudice for purposes of exhaustion. *In re Turner,* supra at p. 323. In order to preserve this issue for review, *see* Sup. Ct. Rule 10.1(a) (conflicting decisions of Court of Appeals as basis for review on certiorari); Fed. R. App. P., Rule 35(a)(1) (securing uniformity of decision as ground for hearing en banc); petitioner submits that no part of the instant amended petition can be subject to dismissal under Rule 9(b).

This position is also supported by the decision of the Court of Appeals in *Calderon v. United States District Court (Taylor),* ___ F.3d ___, 1998 WL 24138 (9th Cir. January 28, 1998), in which the court held that a district court has discretion to hold the exhausted part of a habeas petition in abeyance while dismissing the unexhausted claims for exhaustion. An amended petition, adding the claims following exhaustion, could not rationally be considered a "second or successive" one under Rule 9(b) because there

would be no difference in substance between that situation and the one presented here where the previous petition was dismissed without prejudice in its entirety.

The *Turner* decision makes the jurisprudence in this circuit on this issue fundamentally incoherent. It is clear that the AEDPA was intended to, and did, impose restrictions on the filing of "second or successive" habeas corpus petitions in 28 U.S.C. §2244(b) that are more stringent than the preexisting caselaw on abuse of the writ. *E.g., Felker v. Turpin,* ___ U.S. ___, 116 S.Ct. 2333, 2340 (1996); *cf. Schlup v. Delo,* 513 U.S. 298 (1995); *McCleskey v. Zant,* 499 U.S. 467 (1991). Under *Turner,* however, it does not matter how many previous federal petitions have been dismissed for exhaustion: a new petition under the AEDPA is not a "second or successive" one under 28 U.S.C. §2244(b). *Turner* and *Farmer* can be harmonized if this court concludes that the *Farmer* decision is limited to cases pre-dating the enactment of the A.E.D.P.A. A contrary conclusion ignores the holding in *Turner* a case more applicable to the instant action because it was controlled by the A.E.D.P.A.

D. There is no basis for finding abuse as a result of presentation of unexhausted claims.

As shown above, the amended petition before this court is fully exhausted. As a result, there is no basis for dismissal, with or without prejudice. The basis for the theory of abuse of the writ in the non-McCleskey context – that is, when there has been no "first round of federal

habeas," *McCleskey v. Zant*, 499 U.S. at 490 – is (as originally articulated by the state in this case) that the petitioner is attempting to evade resolution of his constitutional claims by repeatedly filing mixed petitions, thus avoiding a decision on the merits due to the necessity of dismissal for exhaustion. Petitioner here was not, and has not been, seeking to evade such a resolution. There is accordingly no basis for the state to seek dismissal either for exhaustion or on the basis of abuse.

Petitioner submits that a hearing on that issue is necessary before final resolution of any question involving petitioner's substantial rights.

II. CONCLUSION

For the reasons stated above and in petitioner's opposition to respondents motion to dismiss, petitioner respectfully requests that this Court alter or amend its Memorandum Decision and Order entered on March 11, 1998.

Dated this 25th day of March, 1998.

Respectfully submitted,

/s/ Deborah A. Treviño
Deborah A. Treviño
Assistant Federal Public Defender
Attorney for Petitioner

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ANTONIO T. SLACK, Petitioner, -vs- DIRECTOR, NDOP, et al., Respondents.	)	CV-N-95-194-DWH

CERTIFICATE OF MAILING

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on March 25, 1998, she served a copy of the above and foregoing document by placing a true and correct copy into the United States mail, postage prepaid and addressed to the persons named below:

Julie Slabaugh
Deputy Attorney General
100 N. Carson Street
Carson City, NV 89701

Antonio T. Slack
#31395
Ely State Prison
P.O. Box 1989
Ely, NV 89301

/s/ Pamela M. Ramage
Pamela M. Ramage
Legal Assistant

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO A. SLACK, Petitioner, vs. E.K. McDANIEL, *et al.*, Respondents.	Case No. CV-N-95-194-DWH MEMORANDUM DECISION AND ORDER (Filed Mar. 30, 1998)

Petitioner Antonio A. Slack has filed an amended petition for habeas relief pursuant to 28 U.S.C. § 2254 (#65). Respondents move to dismiss claiming several grounds are unexhausted and abusive (#66). The Court ordered Slack to file points and authorities addressing whether he can overcome the abuse of the writ bar that is applicable to grounds two, four(C), and five, six and seven (#72). Slack has filed a motion for reconsideration of the court order (#73). For the reasons set forth below, the Court finds grounds two, four(C), five, six and seven are abusive and ground three is unexhausted. Therefore the petition must be dismissed.

BACKGROUND

In February 1990, a jury found Slack guilty of second degree murder with use of a deadly weapon. *See* #16, ex.12. Slack was sentenced to two consecutive life terms with the possibility of parole. *See* #16, ex.13. Slack filed a direct appeal with the Nevada Supreme Court which was dismissed. *See* #16, ex.22.

Slack then filed his first federal habeas petition with this court. *See* #16, ex.25. In his first habeas petition, Slack alleged: (1) insufficient evidence was adduced at trial to support his conviction; (2) the trial court improperly allowed prejudicial evidence of sexual misconduct; (3) the reasonable doubt jury instruction was unconstitutional; and (4) the trial court failed to adequately define the premeditation instruction. In that action, Slack filed a motion to stay the proceedings so he could exhaust the following issues before continuing with his federal habeas petition: (1) ineffective assistance of counsel during pre-trial proceedings and trial because counsel failed to raise Franklin violation, and failed to request accomplice or informant instruction; (2) trial court erred in not giving an accomplice jury instruction; (3) trial court erred in allowing co-defendant to testify prior to state making a deal with him; (4) prosecutorial misconduct when prosecutor failed to instruct jury that only fingerprints on the murder weapon were from co-defendant. The court dismissed Slack's first habeas petition without prejudice, and granted him leave to file an application to renew upon exhaustion of all state remedies. *See Slack v. Director of Nevada State Prisons,* CV-N-91-561-HDM.

In 1992, Slack filed a state habeas petition in the Eighth Judicial District Court of Nevada. *See* #16, ex.31. The district court denied the petition, *see* #16, ex. 37, and the Nevada Supreme Court dismissed Slack's appeal. *See* #16, ex.39.

In 1995, Slack filed his second federal habeas petition with this Court (#4). After the Court appointed counsel for Slack (#43), he filed an amended habeas petition (#64). In Slack's amended habeas petition he clams [sic]

he is entitled to relief because: (1) insufficient evidence was adduced at trial to support his conviction; (2) he had insufficient notice of his charges since he was charged with "open murder" in an information which did not properly plead each element of first degree murder; (3) the jury was prejudiced by evidence of sexual misconduct; (4) the trial court failed to properly instruct the jury;[1] (5) he was denied effective assistance of counsel;[2] (6) he was denied effective assistance of appellate counsel;[3] and (7) cumulative error.

In their motion to dismiss, respondents argue grounds two, four(C), five, six and seven are abusive. Respondents also argue grounds two, three, four(C), five (B-E), six and seven are unexhausted. Slack was ordered

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[1] In ground four, Slack claims: (a) the reasonable doubt instruction was unconstitutional; (b) the premeditation and deliberation instruction was unconstitutional; and the malice aforethought instruction was unconstitutional.

[2] In ground five, Slack contends his trial counsel was ineffective when he: (a) failed to prevent the introduction of highly prejudicial evidence; (b) failed to object to reasonable doubt jury instruction; (c) failed to object to premeditation and deliberation jury instruction; (d) failed to object to malice aforethought jury instruction; and (e) failed to investigate the facts of case and develop available defenses.

[3] In ground six, Slack argues he was denied effective assistance of appellate counsel when: (a) appellate counsel failed to raise on direct appeal that Slack was denied his right the due process under the Fifth and Fourteenth Amendment when charged with open murder in an information which did not properly plead elements of first degree murder and that the malice aforethought instruction was unconstitutional; and (b) appellate counsel conceded two of the four issues raised on direct appeal.

to show cause and prejudice to overcome the abusive bar; however he filed a motion for reconsideration which the court will deny.

ABUSE OF THE WRIT

A second petition may be dismissed for abuse of the writ if new grounds are alleged and the failure to allege them in the previous petition was an abuse of the writ. *See Farmer v. McDaniel*, 98 F.3d 1548, 1555 (9th Cir.1996). The previous petition need not have been dismissed on the merits. *See id.* at 1557. The instant petition therefore may be subject to dismissal for abuse of the writ.

In *McCleskey v. Zant*, 499 U.S. 467 (1991), the U.S. Supreme Court defined the respective burdens of pleading abuse of the writ. The State met that burden here by noting Slack's previous writ history, identifying the grounds for relief that appear for the first time in the instant petition and alleging that Slack abused the writ. *See id.* The burden now is on Slack to disprove abuse of the writ by showing cause for failing to raise the new grounds for relief earlier and prejudice therefrom. *See id.* Slack does not meet his burden.

In reply to the court order instructing Slack to file points and authorities showing cause and prejudice to overcome the abuse of the writ bar, he filed a motion for reconsideration (#73). First the Court notes that Slack has incorrectly filed his motion for reconsideration pursuant to Fed.R.Civ.P.59. Under this rule a party may move for a new trial or an amendment of a judgment. Since there has not been a trial and a judgment has not been entered in this case, Slack cannot bring a motion pursuant to this

rule. Additionally even if Slack could bring motion under Fed.R.Civ.P.59, the motion must be brought within ten days after the entry of judgment. *See* Fed.R.Civ.P. 59(e). Slack's motion was untimely since it was filed two days after the ten day period expired. Nevertheless, the Court will address Slack's arguments in his motion for reconsideration.

In his motion for reconsideration, Slack claims the State has not established the habeas petition is abusive, the amended petition is not successive, and that the case is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). As previously noted, the State has met its burden under *McClesky* [sic] by specifying which grounds for relief in the amended habeas petition are abusive. Next, the instant petition is Slack's second petition and thus successive. The Ninth Circuit has held that a judge may find a second petition is abusive when new grounds are alleged and a petitioner failed to allege them in the previous petition, even if the previous petition was dismissed for failing to exhaust state remedies. *See Farmer*, 98 F.3d at 1557. Lastly, Slack wrongly asserts the case is governed by the AEDPA because it was commenced after April 26, 1996. First, the instant case was commenced March 27, 1995. Second, the amendments to 28 U.S.C. §§ 2244(a) and 2255 resulting from the AEDPA are not retroactive. *See Lindh v. Murphy*, ___ U.S. ___, ___, 117 S.Ct. 2059, 2063 (1997). Accordingly, the AEDPA is not applicable to this case.

Thus, since Slack has failed to demonstrate cause and prejudice to overcome the abuse of the writ bar, the Court will dismiss grounds two, four(c), five, six and seven as abusive.

EXHAUSTION

Although respondents argue several grounds are unexhausted, the court will only address ground three since all other grounds will be dismissed as abusive. Title 28 U.S.C. § 2254(b) and (c) provide that a state prisoner must exhaust all available state court remedies before filing a petition for habeas corpus in federal court. The exhaustion of available state judicial remedies is ordinarily a prerequisite to obtaining federal habeas corpus relief. 28 U.S.C. § 2254(b) (1988); *Rose v. Lundy*, 455 U.S. 509, 515 (1982). To demonstrate compliance with the exhaustion requirement, a habeas applicant must show that the claim included in the federal petition was "fairly presented" to the state's highest court, *Picard v. Connor*, 404 U.S. 270, 275 (1971), or demonstrate that no state remedy remains available. *Harmon v. Ryan*, 959 F.2d 1457, 1460 (9th Cir. 1992). A claim has been "fairly presented" to the state court if the petitioner has described the operative facts and the legal theory upon which he bases his constitutional claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). Furthermore, a petitioner has described the operative facts and the legal theory upon which he bases his constitutional claim. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). Furthermore, a petitioner cannot merely allege exhaustion; the record must show that the petitioner sought review in the highest state court. *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981) (per curiam), *cert. denied*, 455 U.S. 1023 (1982). In addition, the habeas petitioner must exhaust his state remedies as to each of his federal claims. If a habeas corpus petition contains both exhausted and non-exhausted claims, the petition must be dismissed. *Rose*, 455 U.S. at 520.

In ground three, Slack claims his Fourteenth and Fifth Amendment right to due process was violated when the jury was prejudiced by evidence of sexual misconduct. Respondents contend the claim is unexhausted because although Slack presented the facts of this claim to the Nevada Supreme Court, he did not claim his Fourteenth and Fifth Amendment rights were violated. If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court. *Duncan v. Henry*, 513 U.S. 364, 366 (1995); *Johnson v. Zenon*, 88 F.3d 828, 830 (1996); *see also Ybarra v. Sumner*, 678 F.Supp. 1480, 1481 (D.Nev. 1988) (citing *Picard*, 404 U.S. at 276). In his opening brief to the Nevada Supreme Court on direct appeal, Slack never argued his Fifth or Fourteenth Amendment right to due process was violated when prejudicial evidence was presented to the jury. In his opening brief, Slack relied only upon state law to support his claim. *See* #16, ex.20, pp. 15-18. Thus, the Court finds ground three is unexhausted.

CONCLUSION

Since ground three of Slack's third amended habeas petition is unexhausted, this action will be dismissed to allow Slack the opportunity to present the unexhausted claim to the state court. If Slack wishes to continue with this proceeding instead of returning to state court, he will need to re-open this proceeding and abandon the unexhausted claim as described below. *See Reutter v. Crande*, 109 F.3d 575 (9th Cir. 1997). Alternatively, Slack may immediately commence a new federal action in which this court could review the merits of the unexhausted

claim because the new action would be subject to the statutory changes effected by the Antiterrorism and Effective Death Penalty Act (AEDPA);[4] however, relief could not be granted based on any unexhausted claim.

Pursuant to the AEDPA, the dismissal of this action will trigger the commencement of the one year statute of limitations period for Slack to return to federal court with a new action. 28 U.S.C. § 2244(d)(1). The time during which Slack's post conviction proceeding is pending in state court will not count toward the one year period. 28 U.S.C. § 2244(d)(2). Therefore, if Slack waits three months after this dismissal to file a state post conviction petition, he will have only nine months from the disposition of that state proceeding in which to commence a new federal proceeding. The failure to timely commence a new federal proceeding will bar Slack from having the validity of his conviction and/or sentence reviewed in federal court.

IT IS THEREFORE **ORDERED** that Slack's motion for reconsideration (#73) is **DENIED**.

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[4] Until recently, a federal court could not proceed with a mixed petition that contained both exhausted and unexhausted claims for habeas corpus relief. *Rose*, 455 U.S. at 521-22; *Szeto v. Rusen*, 709 F.2d 1340, 1341 (9th Cir. 1983). However, in April 1996, Congress amended 28 U.S.C. § 2254 to give federal courts the authority to deny habeas relief based on unexhausted grounds. Thus, now a federal court can address a mixed petition, but can only deny relief regarding any unexhausted grounds.

IT IS FURTHER **ORDERED** that grounds two, four(C), five, six and seven are **DISMISSED** with prejudice as abusive.

IT IS FURTHER **ORDERED** that respondents' motion to dismiss (#67) is **GRANTED**, and this action is **DISMISSED** without prejudice. If Slack wishes to abandon the unexhausted claim and proceed with this action, he should file a motion to vacate the judgment and a declaration of abandonment, signed by petitioner, or the above identified ground within thirty (30) days. The Clerk shall enter judgment accordingly.

Dated this 30th day of March, 1998

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

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Attorney for ANTONIO SLACK

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ANTONIO SLACK, Petitioner,	)	CV-N-95-194-DWH
v.	)	NOTICE OF APPEAL
E.K. McDANIEL et al., Respondents.	)	(Filed Apr. 29, 1998)

NOTICE is hereby given that Antonio Slack, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment in a civil case dated March 31, 1998.

DATED this 28th day of April, 1998.

/s/ John C. Lambrose
JOHN C. LAMBROSE
Asst. Federal Public Defender

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender and is a person of such age and discretion as to be competent to serve papers.

That on April 28, 1998, she served a copy of the attached NOTICE OF APPEAL by placing a copy in a self addressed envelope postage prepaid to the addressee below:

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Deputy Attorney General
100 N. Carson Street
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#31395
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Counsel for Petitioner

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ANTONIO T. SLACK, Petitioner, vs. Director, NDOP, et al., Respondents.	)	CV-N-95-194-DWH
	)	**APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE**
	)	(Filed May 11, 1998)

COMES NOW, petitioner, Antonio T. Slack, and submits this application for a certificate of probable cause.

This application is based on the following points and authorities, as well as the pleadings and papers on file in this case.

Dated this 8th day of May, 1998.

Respectfully submitted,

/s/ John C. Lambrose
JOHN C. LAMBROSE
Asst. Federal Public Defender

I. POINTS AND AUTHORITIES

A. Facts

The petitioner commenced this action on March 27, 1995. CR 1. On February 13, 1997 this court appointed counsel CR 43. Thereafter, the petitioner filed his third amended petition.[1] The respondent moved to dismiss the third amended petition on procedural grounds. Specifically the respondent contended that grounds two, four(C), five, six and seven were abusive and sought a dismissal of those grounds.[2] The respondent did not specifically plead or allege how Slack's previous conduct regarding his federal writ history was indicative of an intent on his part to withhold claims in order to "vex or harass" the respondents or "delay" the final resolution of his federal remedy. *Farmer v. McDaniel*, 98 F.3d 1548, 1556 (9th Cir. 1996) (citations omitted). Instead, the respondent simply argued that Slack's failure to present the allegedly abusive claims in his previous 1991 § 2254 action resulted in per se abuse. See motion to dismiss at p. 9 ll. 22-28.

The respondent also contended that grounds two, four (C), three, most of five, six and seven were not exhausted and that fact rendered the third amended petition as "mixed" in nature requiring a dismissal of the instant case.[3] The petitioner opposed the motion to

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[1] The grounds raised in Slack's third amended petition are set out in this Court's March 30, 1998 Order at pages 2 and 3. CR.74.

[2] Slack's third amended petition alleged that grounds two and 4(C) were not exhausted. CR 74.

[3] The respondent did not plead any other procedural defenses. Moreover, although the respondent did not affirmatively seek a dismissal of this case without prejudice it must necessarily be assumed that a dismissal no exhaustion grounds is construed to be without prejudice. This court's order is in accord. CR 74 at p.7

dismiss arguing that no ground pled in the third amended petition was abusive. Opposition to Motion to Dismiss. Slack also argued against dismissal on exhaustion grounds as to any of the claims raised in the petition. Id.

On March 11, 1998 the court entered an interim order finding grounds two, four(C), five, six and seven abusive. CR 72. The court's conclusion was predicated on the fact that Slack's third amended petition contained grounds (two, four(c) five, six and seven) that were not pled in Slack's previous federal petition which had been dismissed on exhaustion grounds. Id. At p. 2 (comparing 1991 claims with claims in instant action). Without any further scrutiny of Slack's conduct – that is without any consideration of whether petitioner had any intent to vex, harass, or delay – the court concluded that the abusive grounds would be dismissed absent a demonstration of cause and prejudice. Id. Citing *McCleskey v. Zant*, 499 U.S. 467 (1991).[4]

On March 26, 1998 Slack asked the court to reconsider its decision arguing that: (1) the respondent failed to allege sufficient facts to support an abuse of the writ; (2) Slack's third amended petition was not a "second or successive petition"; (3) abuse of the writ is inapposite to

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[4] The court did not address Slack's argument that *McCleskey* standard could not apply in this case. See Opposition to motion to dismiss.

this case because the claims alleged in the third amended petition cannot be dismissed on exhaustion grounds. Motion to reconsider, filed March 26, 1998.[5]

On April 2, 1998 this court entered an order dismissing the action without prejudice. CR 74. The court concluded that grounds two, four(C), five, six and seven were abusive and dismissed those grounds accordingly. Id. This court did not resolve the respondent's exhaustion argument on these claims. The court did not discuss how Slack's previous federal writ history warranted such a harsh sanction. It simply adopted the respondent's position that Slack's failure to plead the claims in his 1991 petition was a per se abuse of the writ. CR 72. Finally, the court found that ground three was unexhausted and that fact rendered the petition "mixed" in nature requiring a dismissal of the instant action without prejudice. Id.

B. The amendments to § 2253 do not apply to cases filed prior to the AEDPA's effective date.

The antiterrorism and effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, signed into law on April 24, 1996, enacted the present 28 U.S.C.A. § 2253 (Supp. 1997, requiring a "certificate of appealability" in order for an appeal to be taken from a final order in a habeas proceeding. *See* 28 U.S.C.A. § 2253(b) (requiring "substantial showing of the denial of a constitutional right"). Prior to

[5] Slack had previously argued that the court could not dismiss any of the grounds under the exhaustion doctrine but the court's March 11, 1998 order did not resolve that issue.

the enactment of the AEDPA, § 2253 required a "certificate of probable cause" in order for an appeal to be taken from a final order in a habeas proceeding. *See* 28 U.S.C.A. § 2253 (1994).

The portions of the AEDPA which apply to noncapital cases have been held to be inapplicable to cases already pending when the Act was passed. *Lindh v. Murphy*, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (the portions of § 2254(d) dealing with noncapital cases are inapplicable to cases already pending when the Act was passed); *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997) (the AEDPA does not apply retroactively to cases filed in federal courts in Ninth Circuit prior to Act's effective date).

Slack filed his petition on May 30, 1995, well before the date the AEDPA was passed (April 24, 1996). CR 4. Accordingly, his case is governed by the pre-Act version of § 2253 (requiring a certificate of probable cause). The amendments to § 2253 promulgated by the AEDPA cannot apply retroactively to Slack's cases. *See Lindh*, and *Jeffries, see also Greenwalt v. Stewart*, 105 F.3d 1268 (9th Cir. 1997) (applying "certificate of probable cause") standard to dismissal of petition filed April 23, 1996).

C. Slack is entitled to a certificate of probable cause.

As shown above, however, the AEDPA does not apply to this matter. A CPC is appropriate where a petitioner can show a "substantial showing of the denial of a federal right." *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394-95, 77 L.Ed.2 1090) (1993)). To satisfy the

"substantial showing" standard, a petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot*, 463 U.S. at 893 n.4, 103 S.Ct. At 3395 n.4 (citations omitted).

1. It is at least debatable among jurists of reason that this court erred when it concluded that grounds two, four(C), five, six and seven were abusive.

a. The amended petition is not a "second or successive" one under Rule 9(b).

Initially, in order to preserve the question for review, petitioner submits that Rule 9(b) does not apply to his case at all, because the amended petition before the court is not a "second or successive" one within the meaning of the rule, since the previous federal petitions were dismissed without prejudice for exhaustion. Petitioner recognizes of course that the Court of Appeals has adopted a contrary position. *Farmer v. McDaniel*, 98 F.3d at 1556-1557. See also, Motion for Reconsideration at p. 3, filed March 26, 1998. Every other Court of Appeals that has addressed this issue, however, has held that a petition is not subject to Rule 9(b) as a "second or successive" one if previous petitions have been dismissed without prejudice for exhaustion. *McWilliams v. State of Colorado*, 121 F.3d 573, 575 (10th Cir. 1997); *Benton v. Washington*, 106 F.3d 162, 164 (7th Cir. 1996); *Camarano v. Irvin*, 98 F.3d 44, 46-47 (3d Cir. 1996); *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997); *Woods v. Whitley*, 933 F.2d 321, 322 (5th Cir. 1991); *Jones v. Estelle*, 722 F.2d 159, 168 (5th Cir. 1983) (en

banc) *cert. denied*, 466 U.S. 976 (1984); *Dickson v. Maine*, 101 F.3d 791, 791 (1st Cir. 1996) (per curiam). In fact, the Court of Appeals for this circuit has created an intra-circuit conflict with *Farmer* by holding that a "second or successive" petition under the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) – which uses the identical language in 28 U.S.C. §2244(b) that is used in, and was adopted from, Rule 9(b) – does not refer to a petition filed after a previous petition has been dismissed without prejudice for purposes of exhaustion. *In re Turner*, 101 F.3d 1323, 1323 (9th Cir. 1997). Further, the Supreme Court's intervening decision in *Calderon v. Thompson*, ___ U.S. ___, 1998 WL 204593 (U.S.) treats the definition of a "second or successive" petition as settled, referring only to petitions filed after a previous petition has been addressed on the merits. That decision undercuts the decision in *Farmer* and this court should not follow the *Farmer* definition of "second or successive" petition. In any event, in order to preserve this issue for review, *see* Sup. Ct. Rule 10.1(a) (conflicting decisions of Court of Appeals as basis for review on certiorari); Fed. R. App. P., Rule 35(a)(1) (securing uniformity of decision as ground for hearing en banc); petitioner submits that no part of the instant amended petition can be subject to dismissal under Rule 9(b) at all.[6]

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[6] This position is also supported by the decision of the Court of Appeals in *Calderon v. United States District Court (Taylor)*, 134 F.3d 981 (9th Cir. 1998), in which the court held that a district court has discretion to hold the exhausted part of a habeas petition in abeyance while dismissing the unexhausted claims for exhaustion. An amended petition, adding the claims following exhaustion, could not rationally be considered a

The *Turner* decision makes the jurisprudence in this circuit on this issue fundamentally incoherent. It is clear that the AEDPA was intended to, and did, impose restrictions of the filing of "second or successive" habeas corpus petitions in 28 U.S.C. §2244(b) that are more stringent than the preexisting caselaw on abuse of the writ. *E.g., Felker v. Turpin*, ___ U.S. ___, 116 S.Ct. 2333, 2340 (1996); *cf. Schlup v. Delo*, 513 U.S. 298 (1995); *McCleskey v. Zant*, 499 U.S. 467 (1991). Under *Turner*, however, it does not matter how many previous federal petitions have been dismissed for exhaustion: a new petition under the AEDPA is not a "second or successive" one under 28 U.S.C. §2244(b). Under the Court of Appeals' decision in *Farmer*, however, a petition can be treated as a "second or successive" one under the less stringent, pre-AEDPA law, and thus abuse could allegedly be found although it could not even be considered under current law.

b. Abuse of the writ does not apply to this case.

In dismissing the above grounds this court relied on the rule announced in *Farmer v. McDaniel*, supra. In *Farmer*, the Ninth Circuit held that in very limited circumstances a particular claim pled in § 2254 petition can be

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"second or successive" one under Rule 9(b); but there would be no difference in substance between that situation and the one presented here where the previous petitions was [sic] dismissed without prejudice in their entirety. Moreover, the petitioner's case is bolstered by the fact that he sought a stay in his earlier federal proceeding which was certainly appropriate under the then-existing rule in the Ninth Circuit. See Exh. B at tab 5; see also *Neuschafer v. Whitley*, 860 F.2d 1470 (9th Cir. 1988)

dismissed even though the petitioner's previous § 2254 action had been dismissed without prejudice. Id. at p. 1560. The holding in *Farmer* does not apply to this case for several reasons. First, Farmer's previous federal writ history included three previous petitions spanning a period of nearly eight years. Id. At pp. 1549-1551. Slack, on the other hand, filed only one previous federal petition.[7] Second, Farmer was represented by counsel in each of his previous forays into federal court. Id. At p. 1348-1350. Slack's previous federal petition was litigated pro se. Id. Third, Farmer's previous federal litigation resulted in a more significant expenditure of federal judicial resources. Slack's previous federal petition was filed on November 27, 1991 and dismissed without prejudice less than ninety days later. See, Exh. A, *Slack v. Director*, CV-N-91-561-HDM at CR 1. The only "litigation" during that brief period of time involved the respondent's motion for extension of time (CR 4) to respond to the court's December 10, 1991 order directing that a response to the petition be filed no later than December 27, 1991. CR 3. On February 5, 1992 (five days prior to the respondent's new deadline) the petitioner asked to have the action held in abeyance while he returned to state court to exhaust his claims. CR 5. The court, instead, opted to dismiss the action without prejudice. CR 7. This occurred on February 19, 1992 and on July 10, 1992 Slack filed his state post-conviction petition. The final, and most compelling difference between Slack's procedural history and the history outlined in *Farmer* is that Slack

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[7] The previous federal file is attached to these points and authorities at Exh. A.

was never admonished, in any written order, that the failure to present all of his known claims for relief could result in a bar of those claims in a later federal action. Compare Exhibit A with 98 F.3d at p. 1550 n. 2.

The Ninth Circuit's decision in, *Farmer*, is explicitly very limited in scope. The court observed as much in three different sections of the opinion. 98 F.3d at p. 1549, 1554, and 1560. In *Farmer* the Ninth Circuit distilled its very narrow holding as follows:

> In short, what we hold, *and all that we hold*, is that the district court was not precluded as a matter of law from considering whether Farmer's conduct in failing to allege grounds in prior petitions that he alleged the third time around (if he did) was abusive solely on account of the fact that his prior petitions were not reviewed on the merits.

Id. at p. 1560 (emphasis supplied). The Ninth Circuit then remanded the case to the district court in order to determine whether Farmer's *amended petition in his third federal §2254 action* contained abusive grounds for relief. Id. However, the Court was careful to note that the fact that a previous federal petition was not reviewed on the merits is "an important factor that informs the court's discretion in applying the abuse of the writ doctrine." Id. At p. 1549. It is not dispositive and cannot, standing alone, end the inquiry. Slack's procedural history does not match the *Farmer* case nor does it bear any similarity other than Slack had a previous § 2254 petition dismissed without prejudice because it contained unexhausted claims. This court's per se finding of abuse in Slack's case is contrary to *Farmer's* admonition that before such a

conclusion can be reached a thorough inspection of the previous writ history is mandated so the court's exercise of discretion is "informed". Id.

Abuse of the writ as a procedural bar, focuses on the conduct and motive of the petitioner relative to his previous federal § 2254 litigation. "Abuse of the writ doctrine examines *petitioner's* conduct. The question is whether petitioner possesses, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter throughout the habeas process." 98 F.3d at 1560, quoting *McCleskey v. Zant*, 499 U.S. 467, 498 (1991) (emphasis in original). This court can take judicial notice of the fact that at least one judge in the federal district of Nevada is in accord with this interpretation of *Farmer*. See, *Duckett v. Godinez*, 67 F.3d 734, 741 (9th Cir. 1995) (observing that a court can take judicial notice of other state or federal proceedings). In *Pellegrini v. McDaniel* case no. CV-S-96-400 PMP(LRL), the district court was asked to find several of the petitioner's claims abusive because they were not presented in a previous federal petition. The court refused and predicated its decision on the fact that the previous action was litigated pro se, lasted less than four months, was filed in order to obtain a stay of execution, and was ultimately dismissed without prejudice. See exhibit B attached hereto.

c. If abuse of the writ applies to this case the respondent did not demonstrate that an abuse was committed.

This court concluded that abuse has been established as a matter of law because of the existence of a previous federal petition that was dismissed for exhaustion. This court relied, in part, on *McCleskey*. Petitioner submits that *McCleskey* overruled *Sanders v. United States*, 373 U.S. 1 (1963), only with respect to cases in which there has been a "first round of federal habeas," *McCleskey*, 499 U.S. at 490, and that *Sanders* states the applicable standard of abuse in non-*McCleskey* situations. This position is consistent with the decision of the Court of Appeals in *Farmer*. The court did not reach the question whether any of the claims in the amended petition were new, "or if they are, whether there has been any abuse of the writ. That is entirely for the district court to decide, in its discretion." *Farmer*, 98 F.3d at 1460 (footnote omitted). If the *McCleskey* standard of abuse applied in this situation, the Court of Appeals would have had no reason to reserve the question of abuse: any new claim would be abusive and the only issue would be whether petitioner could establish an excuse. There would also be no occasion for this court to exercise its discretion: if a new claim in a petition filed after the dismissal of previous petitions for exhaustion were subjected to the *McCleskey* standard, abuse would be demonstrated, as a matter of law, not as a matter of discretion.

Petitioner submits that the standard for establishing abuse in the non-*McCleskey* context remains the standard of *Sanders*. This court's conclusion that *McCleskey* overruled *Sanders* in toto – without any analysis and sub silentio – is simply not credible, in light of the undisputed fact that the Rule 9(b) codification of *Sanders* remains in effect for pre-AEDPA cases. *See Lonchar v. Thomas*, ___ U.S. ___, 115 S.Ct. 1293 (1996) (federal courts should not impose procedural requirements beyond those incorporated in habeas rules). It is equally impossible to conclude, in light of the emphasis placed in *McCleskey* on the costs of repetitive federal review of state convictions, that the *McCleskey* decision – again sub silentio – intended to erase all distinctions for abuse purposes between successor petitions filed after a complete round of federal habeas corpus review and petitions filed after a previous petition has been dismissed "without prejudice" for exhaustion and no federal review at all has occurred. Nothing in the *Farmer* or *McCleskey* decisions supports so radical a departure from prior law; and such a departure from previous law would not be consistent with the "evolutionary process" of abuse of the writ jurisprudence, *see Felker v. Turpin*, ___ U.S. ___, 116 S.Ct. 2333, 2340 (1996), but would be a quantum leap of logic.[8]

It is clear that *McCleskey* abuse does not apply in this case, because there was no prior determination of the

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[8] The per se rule could lead to truly surreal results. For example, a petitioner could file an amended petition as of right, under Fed. R. Civ. P., Rule 15(a); and the court could be forced by the state to conduct abuse of the writ analysis for failure to include claims in the initial petition which is superseded by the "second or successive" amended petition. In short, every amendment to every petition would be subjected to the same kind of abuse analysis that would be conducted if the petitioner had already received a complete round of federal court review of the claims on the merits in a first petition. Nothing in the Supreme Court's jurisprudence suggests so irrational a result.

merits. The second type of abuse may arise under the circumstances suggested by *Sanders*, upon which Rule 9(b) is based. This type of abuse requires a showing that a new claim in a petition was "deliberately withheld" from a previous petition, former 28 U.S.C. § 2244(b); *Sanders*, 373 U.S. at 18, or that the petitioner "deliberately abandon[ed]" the claim in a hearing on a previous petition, *id.*, citing *Wong Doo v. United States*, 265 U.S. 239, 241 (1924); or that the "only purpose" or the petition is "to vex, harass or delay," *Sanders*, 373 U.S. at 18; or that the petitioner is deliberately engaging in needless piecemeal litigation. *Sanders*, 373 U.S. at 18.

The *Farmer* decision explicitly acknowledged the continuing validity of these standards for non-*McCleskey* abuse:

> A federal court need not consider habeas claims previously unlitigated in federal court if it determines that the petitioner (1) made a conscious decision deliberately to withhold them from a prior petition, (2) is pursuing needless piecemeal litigation, or (3) has raised the claims only to vex, harass, or delay. Where there is no affirmative indication in the record that the petitioner made a conscious decision deliberately to withhold his claim, proceed by piecemeal litigation, to vex or harass or annoy the court or the state, a second petition raising a new claim is not an abuse of the writ.
>
> The state has presented no evidence that any of the factors outlined in *Sanders* are present. Moreover, there is nothing in the history of this case to indicate that Hamilton deliberately withheld his claim in the hope of being granted two hearings instead of one.

Farmer, 98 F.3d at 1559, *quoting Hamilton v. Vasquez*, 882 F.2d 1469, 1473 (9th Cir. 1989) (citations omitted).

This analysis of *Sanders* abuse is the only one that fits into the text and structure of the applicable statutes and rules. The *Farmer* decision emphasized the language of Rule 9(b) in concluding that abuse of the writ could be found, even if no prior proceeding on the merits of a previous petition had been conducted, relying on the language "[a] second or successive petition may be dismissed . . . if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." *Farmer*, 98 F.3d at 1555. The Advisory Committee Notes (1976) to Rule 9(b), quoted in *Farmer*, explicitly adopt the *Sanders* analysis of the standard of abuse under this theory:

> With reference to a successive application asserting a new ground or one not previously decided on the merits, the court in *Sanders* noted:
>
> In either case, full consideration of the merits of the new application can be avoided [only] if there has been an abuse of the writ * * * and this the Government has the burden of pleading. * * *
>
> Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, * * * he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground.
>
> 373 U.S. at 17-18 [83 S.Ct. at 1078].

Farmer, 98 F.3d at 1555-1556. The Notes conclude that Rule 9(b) will not "eliminate a remedy to which the petitioner is rightfully entitled," and emphasize the language of *Sanders* holding that

> Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.
>
> 373 U.S. at 19 [83 S.Ct. at 1078].

Farmer, 98 F.3d at 1556.

Thus the non-*McCleskey* prong of Rule 9(b) incorporates the *Sanders* standards of abuse, as the Advisory Committee Notes clearly indicate. This conclusion is also the only one consistent with the settled principle of statutory construction that an enactment which employs a term of art (like "abuse of the writ") which has been judicially defined is presumed to have incorporated the judicial interpretation of the term. *E.g., McDermott Intern., Inc. v. Wilander*, 498 U.S. 337, 342 (1991); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 813 (1989).

2. It is at least debatable among jurists of reason that this court erred when it concluded that ground three was not exhausted.

Ground three of the amended petition challenges the constitutionality of the use of evidence of sexual misconduct designed to prejudice the jury. Here, respondent argues that ground three is unexhausted because the claim was not presented as a violation of Slack's Fifth and

Fourteenth Amendments. The record belies that assertion. That Slack's right to due process is impinged by this violation of his right to a fair trial cannot come as surprise to the state. It is clear that the *analysis* employed at the appellate level inherently implicated due process and fair trial claims. The "unexhausted claims" upon which respondent relies cannot reasonably be said to have fundamentally altered the legal claim of prosecutorial misconduct or to reflect an attempt by petitioner to withhold facts or legal theory from the state courts. Petitioner's attempts to state as many specifics as possible underlying his claim of prosecutorial misconduct can hardly be said under the circumstances to have caused the claim to become unexhausted.

Moreover, the exhaustion doctrine does not require that a federal habeas corpus petitioner frame a claim in precisely the same manner in which it was set forth in the state court pleadings. *See Williams v. Holbrook*, 691 F.2d 3, 6 (1st Cir. 1982) (petitioner "not precluded from some reformulation of the claims . . . made in the state courts"). Respondent must not be allowed to extrapolate Slack's claims to the point of requiring that the federal petition be identical to the prior state petitions. *See Engle v. Isacc*, 456 U.S. 107, 123-124 n.25 (1982) ("a creative appellate judge could almost always distill an unexhausted due process claim . . . [W]e are reluctant to interpolate an unexhausted claim not directly presented by the petition. *Rose v. Lundy*, does not compel such harsh treatment of habeas petitions."). Thus, although respondent has attempted to "mix" Slack's petition, *see Lacey v. Gabriel*, 732 F.2d 7, 11-12 (1st Cir.) ("district court [could not] 'mix' Lacy's petition for him."), *cert. denied*, 469 U.S. 861

(1984), the rule requiring liberal construction of prisoners' pleadings should not be applied to Slack's disadvantage.

II. CONCLUSION

For the reasons stated Slack respectfully asks this Court for an order granting a certificate of probable cause.

Respectfully submitted,

/s/ John C. Lambrose
JOHN C. LAMBROSE
Assistant Federal Public Defender

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ANTONIO SLACK, Petitioner,	)	CV-N-95-194-DWH
-vs-	)	
E.K. McDaniel, et al., Respondents.	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on May 8, 1998, she served a copy of the above and foregoing document by placing a true and correct copy into the United States mail, postage prepaid and addressed to the persons named below:

Julie Slabaugh
Deputy Attorney General
Criminal Justice Division
100 North Carson Street
Carson City, NV 89701-4717

Antonio Slack
#3395
Ely State Prison
P.O. Box 1989
Ely, NV 89301

/s/ Illegible

[EXHIBITS OMITTED]

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTONIO SLACK,
Petitioner,

vs.

E.K. McDANIEL,
et al.,
Respondents.

Case No. CV-N-95-194-DWH

DENIAL OF CERTIFICATE OF PROBABLE CAUSE

Petitioner Antonio Slack has filed a notice of appeal from the decision of this Court denying his petition for writ of habeas corpus. Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, the notice of appeal will also be considered as a request for the issuance of a certificate of probable cause. The Court of Appeals may not issue its ruling until this court first determines whether Slack has adequate grounds to pursue his appeal. Fed.R.App. P. 22(b); *McCarthy v. Harper*, 449 U.S. 1309 (1981); *Christian v. Rhode*, 41 F.3d 461, 470 (9th Cir.1994).

To obtain a certificate of probable cause to appeal the Court's denial of his petition, Slack need not show that he ought to prevail on the merits of his claims. He must, however, make a substantial showing of the denial of a federal right, and he must demonstrate that there exist legal issues "debatable among jurists of reason." In other words, Slack must show that a court could resolve the issues in a different manner, or that the questions he seeks to raise on appeal "are adequate to deserve encouragement to proceed further." *Barefoot v. Estelle*, 463 U.S. 880, 893 & n. 4 (1983). Since Slack's appeal would not

raise any substantial issue, his request for a certificate of probable cause will be denied.

IT IS THEREFORE **ORDERED** that a certificate of probable cause is hereby **DENIED.**

Dated this 11 day of May, 1998.

/s/ Illegible
UNITED STATES
DISTRICT JUDGE

FRANKIE SUE DEL PAPA

Attorney General
JULIE A. SLABAUGH
Deputy Attorney General
Criminal Justice Division
100 North Carson Street
Carson City, Nevada 89701-4717
Telephone: (702) 687-7338

Attorney for Respondents.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

ANTONIO SLACK, Petitioner, vs. E.K. McDANIEL, *et al.*, Respondents.	Case No. CV-N-95-194-DWH **OPPOSITION TO APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE**

COMES NOW, Respondents, by and through counsel, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, and hereby responds in opposition to Petitioner's Application for Certificate of Probable Cause. This opposition is made and based on the points and authorities attached hereto as well as all of the documents and pleadings on file herein.

RESPECTFULLY SUBMITTED this 18th day of May, 1998.

FRANKIE SUE DEL PAPA
Attorney General

By: /s/ Julie A. Slabaugh
JULIE A. SLABAUGH
Deputy Attorney General
Criminal Justice Division
(702) 687-7338

POINTS AND AUTHORITIES

I. ARGUMENT

A. PETITIONER IS NOT ENTITLED TO A CERTIFICATE OF PROBABLE CAUSE.

The Ninth Circuit Court of Appeals in *Van Pilon v. Reed*, 799 F.2d 1332 (1986) stated:

> Moreover, the purpose of the requirement of a certificate of probable cause is to prevent abuse of the writ through frivolous appeals. *Barefoot v. Estelle*, 463 U.S. 880, 892-93, n.3, 103 S.Ct. 3383, 3394, n.3, 77 L.Ed.2d 1090 (1983). To obtain a certificate of probable cause, the petitioner must make a substantial showing of the denial of (a) federal right. *Id.* at 893, 103 S.Ct. at 3394 (*quoting Stewart v. Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971), *cert. denied*, 406 U.S. 925, 92 S.Ct. 1796, 32 L.Ed.2d 126 (1972)). By issuing a certificate, the district court notifies this court that in its opinion, the petitioner is not abusing the writ through frivolous litigation. The

requirement of a certificate, therefore, tends to screen frivolous appeals.

Van Pilon, at 1335.

Petitioner ANTONIO SLACK (hereinafter SLACK) has not made a substantial showing of a denial of a federal right. This Court properly dismissed SLACK's claims in grounds two, four(C), five, six, and seven as abusive in its order dated March 30, 1998. This Court also properly found that ground three was unexhausted. Therefore, any appeal would be frivolous.

B. THIS COURT DID NOT ERR WHEN IT HELD THAT GROUNDS TWO, FOUR(C), FIVE, SIX AND SEVEN WERE ABUSIVE.

In his application for certificate of probable cause (hereinafter application) SLACK contends that his amended petition is not a second or successive petition under Rule 9(b). In support of his argument SLACK, while conceding that the Ninth Circuit has adopted a contrary position, states that every other Court of appeals that has addressed this issue has held that a petition is not subject to Rule 9(b) as a second and successive petition if previous ones have been dismissed without prejudice for exhaustion. (Application, pg. 5.) SLACK then cites the following cases: *McWilliams v. State of Colorado*, 121 F.3d 573, 575 (10th Cir. 1997); *Benton v. Washington*, 106 F.3d 152, 154 (7th Cir. 1996); *Camarano v. Irvin*, 98 F.3d 44, 46-47 (3rd Cir. 1996); *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997); *Woods v. Whitley*, 933 F.2d 321, 322 (5th Cir. 1991); *Jones v. Estelle*, 722 F.2d 159, 168 (5th Cir. 1983) (en banc), *cert. denied*, 466 U.S. 976 (1984); *Dickson v. Maine*,

101 F.3d 791 (1st Cir. 1996) (per curiam). SLACK's reliance on these cases is misplaced. Every case cited by SLACK is factually and procedurally distinct from this case.

The *McWilliams, Benton, Camarano, Gasery,* and *Dickson* cases involved an analysis under § 2244 after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In fact, these cases do not even mention abuse of the writ. All of these cases involve a petitioner who has returned to state court to exhaust his claims and has filed a subsequent petition containing only exhausted claims. One the cases, *Benton,* involved a previous petition that was never filed and therefore did not even qualify as an actual petition. The *Woods* and *Jones* cases involve petitions that were found to be abusive.

In this case, SLACK returned to State court to exhaust his claims and then filed a second federal petition containing unexhausted claims. Every one of the claims that this Court found were abusive are also unexhausted. (*See* Respondent's Motion to Dismiss filed January 29, 1998.)

SLACK also argues that the *Farmer* case has created an intra-circuit conflict. According to SLACK the Ninth Circuit has decided the issue in a contrary manner in *In re Turner,* 101 F.3d 1323 (9th Cir. 1997), a case decided under the law of the AEDPA. SLACK misunderstands the *Turner* case. The procedural circumstance in *Turner*, unlike the present circumstances, was a situation where the petitioner had previously filed a federal habeas petition, was allowed to return to state court to exhaust his unexhausted claims, did so, and returned to federal court with

the same claims exhausted. As pointed out above, SLACK has returned to federal court with additional unexhausted claims. In addition, the question in *Turner* was whether § 2244, under the AEDPA, applied when the prior petition was dismissed to allow exhaustion. Rule 9(b) is not even mentioned.

Finally, SLACK contends that the Supreme Court's opinion in *Calderon v. Thompson*, ___ U.S. ___ 1998 WL 204593 (U.S.) supports his opinion. *Calderon* has nothing whatsoever to do with the issue in this case and, contrary to SLACK's assertion, offers absolutely no support of his position.

The cases cited by SLACK do not support his position that Rule 9(b) does not apply to his amended petition. This Court's decision that grounds two, four(C), five, six, and seven were abusive as correct under *Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996). SLACK is not entitled to a certificate of probable cause.

C. ABUSE OF THE WRIT APPLIES TO THIS CASE.

SLACK next argues that abuse of the writ does not apply to his case because he has filed only one prior federal petition, his prior petition was litigated pro se, his prior petition was dismissed without prejudice within ninety days and finally, that SLACK was never admonished, in a written order, that failure to present all of his claims could result in a bar of those claims in a later federal action. (Application pgs. 7-8). SLACK's argument has no merit.

There is nothing in Rule 9(b) or *Farmer* which supports SLACK's contention that abuse of the writ only applies if there have been two or more prior petitions, the petitioner was represented by counsel on each of his prior petitions, the prior petitions resulted in a "significant expenditure of federal judicial resources" (Application, pg. 7), and the prior federal court issued a written order advising the petitioner that the failure to raise all of his claims may bar those claims in future proceedings. Indeed, such requirements would virtually eliminate Rule 9(b).

Abuse of the writ occurs when there is a successive petition which does not raise new claims and the former petition was adjudicated on the merits or when the successive petition does raise new claims and the failure of the petitioner to raise those claims previously constitutes abuse. Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Court foll. 28 U.S.C. § 2254; *see also Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1474 (1997). There are no other requirements in order for Rule 9(b) to apply. SLACK's argument to the contrary has no merit.

D. RESPONDENTS HAVE PROPERLY PLEAD ABUSE OF THE WRIT.

The most recent and thorough case dealing with the issue of successive petitions and abuse of the writ is *McCleskey v. Zant*, 111 S.Ct. 1454 (1991). Although *McCleskey* primarily deals with the issue of good cause, the case contains a fairly thorough discussion and history on abuse of the writ. On a Rule 9(b) issue, it is the

government's burden to plead abuse of the writ. *McCleskey* at 1470; *Sanders v. United States*, 373 U.S. 1, 10 (1963). A government meets its burden of pleading if it notes petitioner's prior writ history, indicates the claims appearing for the first time in a successive petition and affirms its belief that petitioner is abusing the writ in a manner prescribed by Rule 9(b). *McCleskey* at 1470. Abuse of the writ may be raised by the court *sua sponte*. *Jones v. Estelle*, 722 F.2d 159, 164 (5th Cir. 1983).

Once abuse of the writ has been alleged, petitioner has the burden of proving that he has not abused the writ. *McCleskey* at 1470; *Price v. Johnston*, 334 U.S. 266, 292 (1948). He must demonstrate "cause" and "prejudice" as those terms are understood in the context of procedural bar, for not presenting the claim in a prior petition. The "cause" element may be excused only if the failure of the federal court to address the claim would constitute a "fundamental miscarriage of justice," i.e., the claim would establish the petitioner's factual innocence. *McCleskey* at 1470-71.

SLACK states in his application that Respondents have not demonstrated that he has abused the writ. However, in their motion to dismiss Respondents properly plead abuse of the writ. The burden then shifted to SLACK to demonstrate that he did not abuse the writ. *McCleskey* at 1470. SLACK did not even attempt to meet his burden. Instead he filed a motion for reconsideration which this Court denied.

In his application, SLACK argues that Rule 9(b) of the rules governing section 2254 cases recognizes two types of abuse of the writ. Specifically, abuse occurs when

a petitioner files a new petition, following the adjudication of a former petition on the merits, which does not raise new claims. SLACK has elected to refer to this type of abuse as *McCleskey* abuse. The second type of abuse under 9(b) according to SLACK, requires a showing that a new claim was deliberately withheld from a previous petition, or that the petitioner deliberately abandoned his claim, or that the only purpose of the petition is to vex, harass, or delay or that the petitioner is deliberately engaging in needless, piecemeal litigation. (Application, pgs. 9-11.)

According to SLACK his two types of abuse have two different standards. With the so-called *McCleskey* abuse, the burden is on the petitioner to show cause and prejudice to overcome the abuse. SLACK then alleges that with the second type of abuse, the type alleged in this case, the burden is on the Respondents to prove that he deliberately withheld a claim in previous litigation, or that the petitioner is engaging in a pattern of needless piecemeal litigation, or is filing the petition solely to vex, harass or delay the opposing party. SLACK is simply wrong.

Abuse of the writ occurs when there is a successive petition which does not raise new claims and the former petition was adjudicated on the merits or when the successive petition does raise new claims and the failure of the petitioner to raise those claims previously constitutes abuse. Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District court foll. 28 U.S.C. § 2254; *See also Farmer v. McDaniel*, 98 F.3d 1548 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1474 (1997). There are not

separate "types" of abuse of the writ governed by different standards. However, there are several ways in which a petitioner can abuse the writ.

There is only one standard governing abuse of the writ, no matter what conduct by the petitioner is at issue. In *McCleskey v. Zant*, 111 S.Ct. 1454 (1991), the United States Supreme Court defined the abuse of the writ doctrine as follows:

> The prohibition against adjudication in federal habeas corpus of claims defaulted in state court is similar in purpose and design to the abuse-of-the-writ doctrine, which in general prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding. The terms "abuse of the writ" and "inexcusable neglect," on the one hand, and "procedural default," on the other, imply a background norm of procedural regularity binding on the petitioner. This explains the presumption against habeas adjudication both of claims defaulted in state court and of claims defaulted in the first round of federal habeas. A federal habeas court's power to excuse these types of defaulted claims derives from the court's equitable discretion. . . . In habeas, equity recognizes that a "suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." . . . For these reasons, both the abuse-of-the writ doctrine and our procedural default jurisprudence concentrate on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time.

Id. at 1468 (citations omitted).

The Supreme Court went on to say:

> The cause and prejudice analysis we have adopted for cases of procedural default applies to an abuse-of-the-writ inquiry in the following manner. When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ. The burden to disprove abuse then becomes petitioner's. To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions.

Id. at 1470.

SLACK argues that his second type of abuse arises under *Sanders v. United States*, 83 S.Ct. 1068 (1963). However, *Sanders* did not create a separate type of abuse, it merely gave an example of conduct that constitutes abuse. The Supreme Court in *McCleskey* discussed *Sanders* stating:

> Although our decisions on the subject do not all admit of ready synthesis, one point emerges with clarity: Abuse of the writ is not confined to instances of deliberate abandonment. *Sanders* mentioned deliberate abandonment as but one example of conduct that disentitled a petitioner to relief.

McCleskey at 1467.

Sanders did not create a separate type of abuse of the writ, it simply discussed one example of a petitioner's conduct which would constitute abuse of the writ. SLACK's attempt to define different "types" of abuse of the writ notwithstanding, there is only one abuse of the writ doctrine which may triggered [sic] by different conduct by the petitioner.

Likewise there is only one standard governing abuse of the writ. Respondents have the burden of pleading abuse of the writ. This is accomplished by noting SLACK's prior writ history, identifying the claims he has raised for the first time and alleging that he has abused the writ. *McCleskey* at 1470. SLACK was given the opportunity to show cause and prejudice to overcome his abuse of the writ and he failed to do so. SLACK is not entitled to a certificate of probable cause.

E. IT IS NOT DEBATABLE AMONG JURISTS OF REASON THAT THIS COURT ERRED WHEN IT CONCLUDED THAT GROUND THREE WAS NOT EXHAUSTED.

SLACK attempts to demonstrate that he is entitled to a certificate of probable cause because jurists of reason could disagree as to whether or not his claim in ground three is unexhausted. In his argument SLACK completely ignores the United States Supreme Court's decision in *Duncan v. Henry*, 513 U.S. 364 (1995). *Duncan* is directly on point with the instant case. SLACK raised his challenge, to the admissibility of evidence that he had sex with his victim, on direct appeal solely as a matter of state evidentiary law, just as the petitioner in *Duncan* did. SLACK

never once mentioned that he was raising a claim under the United States Constitution. The absence of a federal constitutional claim is particularly glaring since SLACK did raise other issues as a violation of the United States Constitution just as the petitioner in *Duncan* did. *Duncan* at 888.

SLACK is attempting to argue the "essentially the same" standard as set forth in *Tamapua v. Shimoda*, 796 F.2d 261 (9th Cir. 1986). However, *Tamapua* is no longer viable in light of *Duncan*. *Keating v. Hood*, 133 F.3d 1240, 1241 (9th Cir. 1998) ("We have repudiated Tamapua on the basis of Duncan.") SLACK has not presented his federal constitutional claims set forth in ground three to the Nevada courts.

It is not debatable among jurists of reason that this Court erred in concluding that ground three was not exhausted. This Court's ruling was correct and SLACK is not entitled to a certificate of probable cause on this issue.

II. CONCLUSION

Based on the foregoing, Respondents respectfully request this Court deny SLACK's application for certificate of probable cause.

RESPECTFULLY SUBMITTED this 18th day of May, 1998.

FRANKIE SUE DEL PAPA
Attorney General

By: /s/ Julie A. Slabaugh
JULIE A. SLABAUGH
Attorney General
Criminal Justice Division
(702) 687-7338

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General of the State of Nevada and that on this 18th day of May, 1998, I served a copy of the foregoing OPPOSITION TO APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE by mailing a true copy, postage prepaid, to:

JOHN C. LAMBROSE
Assistant Federal Public Defender
330 South Third Street
Las Vegas, Nevada 89101

/s/ Illegible

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTONIO TONTON SLACK, Petitioner, vs. E. K. MCDANIEL, Attorney General of the State of Nevada, Respondent.	No. 98-15943 DC# CV-95-194-DWH Nevada (Reno) ORDER (Filed July 7, 1998)

Before: THOMPSON and LEAVY, Circuit Judges

The request for a certificate of probable cause is denied.

Supreme Court of the United States

No. 98-6322

Antonio Tonton Slack,

Petitioner

v.

Eldon McDaniel, Warden, et al.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following question: If a person's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed for failure to exhaust his state remedies and he subsequently exhausts his state remedies and refiled the § 2254 petition, are claims included within that petition that were not included within his initial § 2254 filing "second or successive" habeas applications?

February 22, 1999